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A TREATISE

ON THE

LAW OF RAILROAD

AND OTHER

CORPORATE SECURITIES

INCLUDING

MUNICIPAL AID BONDS.

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BY

LEONARD A. JONES,

AUTHOR OF A TREATISE ON MORTGAGES.

BOSTON:
HOUGHTON, OSGOOD AND COMPANY.
The Riverside Press, Cambridge.
1879.

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TO THE HONORABLE

JOHN F. DILLON, LL. D.,

Judge of the Circuit Court of the United States,

IN TESTIMONY OF THE ESTEEM WHICH THE AUTHOR SHARES WITH THE PROFESSION FOR YOUR JUDICIAL OPINIONS AND LEGAL WRITINGS UPON THE SUBJECTS HERE CONSIDERED,

This Treatise

IS INSCRIBED.

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PREFACE.

THE author, in writing his Treatise on the Law of Mortgages of Real Property, at first intended to follow out the application of the general law of the subject to mortgages made by railroad companies and similar corporations; but he found that any treatment he could give these special topics within the limits of that work would, from its brevity, be wholly unsatisfactory. This fact, together with the consideration that nearly all the adjudications upon corporate mortgages relate to matters mostly foreign to the general Law of Mortgages, led the author to omit these matters from his work upon the general subject. The present volume is intended to make good that omission.

It has been the purpose of the author not to include in the present treatise subjects elementary or general in the Law of Mortgages. The public nature of railroad and other like corporations, having public duties to perform, in return for the franchises granted them, and the nature and extent of their property, have introduced into mortgages of their franchises and property new elements of law which have now developed into a separate branch of jurisprudence. A glance at the Table of Contents of this volume will show how widely the topics considered differ from those which arise under ordinary mortgages; and even when the titles are the same, an examination of the contents will generally show that, as applied to these corporate securities, the substance of the law is different.

The securities considered in this book are of quite recent origin. For the most part they are the outgrowth of the recent extraordinary development of the railroad system of this country. Prior to the year 1860, the courts had only in a few instances been called upon to enforce Railroad Mortgages; and the cases adjudicated since the year 1870 are far more numerous than all that

had been decided before that time. It could therefore hardly be expected that the law of the subject should in so short a time have developed into a complete and harmonious system. Yet it seems that no very important divisions of the subject remain unconsidered; while the leading principles of the law have been as fully and conclusively settled as they will be after a century of adjudications. It has been a very fortunate circumstance in the growth of this branch of jurisprudence that the courts leading the way in it have generally been of the highest authority, both in position and ability. The Supreme Court and the several Circuit Courts of the United States have, directly and indirectly, had the larger share of the responsibility of moulding the law of these securities; and hence there is less diversity of opinion in it than there would have been had the courts of the several states in the first place passed upon the subjects independently.

But while the present development of the law of corporate securities is such as to render possible a systematic statement of it, the decisions are not so numerous as to debar the author from a separate statement and examination of the most important of them, or from quoting freely from the opinions of learned judges to explain and confirm new and leading principles. A great many of the cases have been of such magnitude, both in the public and the private interests involved, that they have compelled the most careful and elaborate attention, both by counsel in their preparation and by courts in their determination; and for this reason also the facts of the cases and the judgments of the courts command a careful examination. Thus it is that the present treatise differs somewhat from the author's work on Mortgages, in considering particular cases with greater fulness of statement and illustration; but it is believed that this mode of treatment will enhance rather than diminish the usefulness of the work. In the future, as the decided points become more numerous, the statement of the law will necessarily be more restricted to principles.

Within a few years the legislation affecting railroad mortgages has become voluminous. In nearly all the States there have been enacted, in different terms, general statutes authorizing railroad companies to convey their franchises and property in mortgage; statutes giving laborers and contractors special liens upon railroads for work done and materials used in their construction or repair; and statutes authorizing the purchasers of railroads upon

foreclosure sales to organize new corporations to hold and operate them. There have also been enacted numerous statutes relating to mortgages of rolling stock; to the making of foreclosure sales; to the rights and duties of mortgage trustees, and to the appointment of receivers. The granting of municipal aid to railroads has been either the subject of constitutional or legislative provisions in almost all the States. A statement of the principal features of the statutory law of the subject has been deemed hardly less important than a full presentation of the decisions of the courts.

LEONARD A. JONES.

BOSTON, *February* 7, 1879.

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LAW OF RAILROAD SECURITIES.

ERRATUM.

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E. D. Potter Jr
Toledo O.

THE LAW OF RAILROAD

AND OTHER CORPORATE SECURITIES.

CHAPTER I.

POWER OF CORPORATIONS TO MORTGAGE THEIR PROPERTY AND FRANCHISES.

I. When legislative authority is essential to a mortgage of corporate property and franchises, 1–25.

II. Statutes authorizing railroad companies to mortgage their property and franchises, 26–67.

I. *When Legislative Authority is essential to a Mortgage of Corporate Property and Franchises.*

1. **It is a settled doctrine of the English law** that a corporation like a railway company, created for the performance of important public functions, and for that purpose endowed with special rights and privileges, cannot, without legislative authority, transfer these rights and privileges, and thus divest itself of its means of discharging its public duties.[1] "I agree," said Lord Cranworth in the House of Lords, delivering the judgment in the case first cited below, "to the proposition urged by the appellants, that *primâ facie* corporate bodies are bound by all contracts under their common seal. When the legislature constitutes a corporation, it gives to that body, *primâ facie*, an absolute right of contracting. But this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation,

[1] Shrewsbury & Birmingham Ry. Co. *v.* Northwestern Ry. Co. 6 H. L. 113; Winch *v.* Birkenhead, &c. Ry. Co. 5 De G. & S. 562; *S. C.* 7 Railw. Cas. 384; South Yorkshire Ry. &c. Co. *v.* Great Northern Ry. Co. 9 Ex. 55, 84; Great Northern Ry. Co. *v.* Eastern Counties Ry. Co. 21 L. J. Ch. 8, 37; 9 Hare, 306; 7 Railw. Cas. 643; East Anglian Ry. *v.* Eastern Counties Ry. Co. 11 C. B. 775; 7 Railw. Cas. 150; Riche *v.* Ashbury Ry. Carriage Co. L. R. 11 Ex. 224, 264; Bagshaw *v.* Eastern Union Ry. Co. 7 Hare, 114; 2 Mac. & G. 389; Whiteside *v.* Bellchamber, 22 Upp. Can. (C. P.) 241.

the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires;* and the question here, as in similar cases, is, whether there is anything on the face of the act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced."

To like effect Lord Justice Cairns, in a recent important case upon this subject, said: "When parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and enforces duties and responsibilities of the largest and most important kind, and confers and enforces them upon the company, which parliament has before it, and upon no other body of persons." [1]

It is also the settled rule that the permanent way and fixed plant of railway companies cannot, without legislative authority, be mortgaged in the ordinary way so as to give the mortgagees the right to enter upon the property or to interfere with the use and possession of it by the companies chartered to use it; and other corporations having public duties are under the same inability respecting the mortgaging of their permanent property.[2]

2. Such also may be considered the settled law of the American courts. — The grant of the franchise to be a corporation, with the grant to build and work a railroad and take tolls from the public, is attended with an obligation on the part of the company to exercise the franchise for the public benefit. The franchise and the attendant privileges are confided to a particular political person, and are not a subject of sale and transfer to any other person or body corporate, except by the authority of some positive provision of law.[3] The function, however, which is not as-

[1] Gardner *v.* London, Chatham & Dover Ry. Co. L. R. 2 Ch. App. 201, 212.

[2] Gardner *v.* London, Chatham & Dover Ry. Co. L. R. 2 Ch. App. 201; Panama, New Zealand & Australian Royal Mail Co. *in re*, L. R. 5 Ch. 321, per Gifford L. J.; Myatt *v.* St. Helen's, &c. Ry. Co. 2 Q. B. 364; Hart *v.* Eastern Union Ry. Co. 7 Ex. 246.

[3] Troy & Rutland R. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Black *v.* Del. & Raritan Canal Co. 22 N. J. Eq. 130, 399; *S. C.* 24 Ib. 455; Stewart's Appeal, 56 Pa. St. 413; State *v.* Consolidation Coal Co. 46 Md. 1, 10; Hays *v.* Ottawa, Oswego. & Fox River Valley R. R. Co. 61 Ill. 422; Arthur *v.* Commercial and Railroad Bank of Vicksburg, 9 Sm. & M. (Miss.) 394, 431. See McAllister *v.* Plant, 54 Miss. 106, 119.

signable, is the corporate existence the right of being a body politic with rights of succession, of acquiring and conveying property, and of suing and being sued in its corporate name. The right to build, own, and manage a railroad, and to take tolls thereon, if given to a natural person, might be assigned by him; for there is nothing in the nature of such a privilege inconsistent with a sale and transfer to another. But a corporation created for a public object can neither transfer its franchise, nor, it would seem, disable itself from performing its public duties, by conveying its track and right of way, or other property which is essential to its fulfilling the duties imposed upon it by its charter.[1]

3. Whether a railroad corporation can without legislative authority transfer its franchises, by way of mortgage, is an inquiry to which the same answer must be made, for the same reason that these privileges are personal to the grantee. Inasmuch as every mortgage may in the end result in an absolute transfer of the mortgaged property, it follows that such a corporation cannot without special authority mortgage its property and give to the mortgagee, upon default, the right to exercise its public duties and functions, or the power to sell and convey these privileges to another.[2]

In a case before the Supreme Court of Massachusetts,[3] Mr. Justice Hoar forcibly states the law: "In the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute;

[1] Richards *v.* Merrimack & Conn. River R. R. Co. 44 N. H. 127, per Bell, C. J.

[2] Carpenter *v.* Black Hawk Gold Mining Co. 65 N. Y. 43, 50; Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35; Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 27; Pierce *v.* Emery, 32 N. H. 484; Arthur *v.* Commercial & Railroad Bank of Vicksburg, 9 S. & M. (Miss.) 394; Atkinson *v.* Marietta & Cincinnati R. R. Co. 15 Ohio St. 21; Stewart *v.* Jones, 40 Mo. 140; New Orleans, Jackson & Great Northern R. R. Co. *v.* Harris, 27 Miss. 517; Hall *v.* Sullivan R. R. Co. 21 Law Reporter, 138; Daniels *v.* Hart, 118 Mass. 543; Wood *v.* Bedford & Bridgeport R. R. Co. 8 Phila. (Pa.) 94; State *v.* Mexican Gulf Ry. Co. 3 Rob. (La.) 513.

This doctrine is substantially denied in Maine. Shepley *v.* Atlantic & St. Lawrence R. R. Co. 55 Me. 395; Kennebec & Portland R. R. Co. *v.* Portland & Kennebec R. R. Co. 59 Me. 9, 23. See § 18.

[3] Commonwealth *v.* Smith, 10 Allen (Mass.), 448; and see East Boston Freight R. R. Co. *v.* Eastern R. R. Co. 13 Ib. 422; Richardson *v.* Sibley, 11 Ib. 65.

having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and in our opinion insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using, and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill and buy another; but a railroad company cannot make a new railroad at its pleasure."

Other like corporations are subject to the same inability to make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on the corporate business.[1] Thus, this inability attaches to a corporation created for the purpose of constructing and maintaining a street railway. The main object in establishing such a corporation is not the profit of the shareholders, but the accommodation of the public. A mortgage made by such a corporation of all its property, without distinct legislative authority, is wholly void and inoperative, because it is in violation of the public policy of the state.[2]

4. Even when organized under a statute providing that the corporation may "acquire and convey, at pleasure, all such real estate as may be necessary and convenient to carry into effect the object of the incorporation," a railroad company has no power

[1] See § 1, last paragraph.

[2] Richardson *v.* Sibley, 11 Allen (Mass.), 65.

to alienate its franchise to be a corporation, or the franchise to construct and maintain a railroad, and receive compensation for the transportation of persons and property, nor any interest in real estate acquired and held solely and exclusively for the purpose of the exercise of such franchise.[1] The general words of the statute do not extend to an alienation of the franchise, and they must be limited to the purposes for which the statute authorized the formation of corporations. When power is given to acquire an interest in real estate for the single and exclusive purpose of the exercise of a franchise, and particularly when, to acquire such interest, there is a delegation of the power of eminent domain, the interest cannot be separated from the use to which alone it can be applied; and if the franchise cannot be conveyed, neither can the interest in real estate with which it is connected be conveyed.[2]

5. **Ordinary private corporations for gain having no public functions,** not only have an implied power to incur debts and borrow money for the purposes of the corporation, but also an implied power to pledge either real or personal property as security.[3] Whatever qualifications of this rule, or exceptions to it, may have been recognized by the English courts,[4] in the United States the rule is established without conflict of authority.[5] The power of such corporations to mortgage, unless expressly prohibited, goes *pari passu* with the power to incur debts. In a recent leading case in England,[6] which involved the question whether a file manufacturing company had power to secure an overdraft at its bankers, by a deposit of title deeds, Mellish, L. J., affirming the

[1] Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372.

[2] Per Gholson, J., in Coe *v.* Columbus, &c. *supra.*

[3] Bank of Australasia *v.* Breillat, 6 Moo. P. C. 152; Royal British Bank *v.* Turquand, 6 E. & B. 327; International Life Ass. Co. *in re*, L. R. 10 Eq. 312; Birmingham Banking Co. *ex parte*, L. R. 6 Ch. App. 83; General Provident Ass. Co. *in re*, L. R. 14 Eq. 507; General South Am. Co. *in re*, 2 Ch. Div. 340; International Life Ass. Soc. *in re*, L. R. 10 Eq. 312.

[4] See German Mining Co. *in re*, 4 De G., M. & G. 19; Lowndes *v.* Garnett, &c. Gold Mining Co. 33 L. J. (Ch.) 418; Norwich Yarn Co. *in re*, 22 Beav. 143; Troup's Case, 29 Beav. 353.

[5] Curtis *v.* Leavitt, 15 N. Y. 9; Beers *v.* Phœnix Glass Co. 14 Barb. (N. Y.) 358; Mead *v.* Keeler, 24 Ib. 20; Partridge *v.* Badger, 25 Ib. 146; Clark *v.* Titcomb, 42 Ib. 122; Barnes *v.* Ontario Bank, 19 N. Y. 152; Nelson *v.* Eaton, 26 N. Y. 410; Bradley *v.* Ballard, 55 Ill. 413; Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

[6] Patent File Co. *in re*, L. R. 6 Ch. 83.

decision of the Vice Chancellor, that the company had such power, said: "It is urged that no company can mortgage, unless expressly authorized to do so. Now the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage, unless expressly prohibited from doing so." And further: "There being nothing in the articles to prohibit the giving of such a security, I am of opinion that the company can give it as well for a past debt as for a future one. In fact, the case is stronger in favor of a security for a past debt, as it would be absurd to say that a company has not power to pay past debts; and if so, why should it be debarred from giving security, which is one way of applying its property in payment of its debts?"

In another case,[1] it was held that a steamship company, being in want of money for the purposes of the company's business, might mortgage its ships as security for the loan, the Vice Chancellor, Page Wood, saying, "I cannot see why it should not be within their ordinary province to raise money by mortgage of their ships, either for the purpose of buying new ships or paying creditors."

Corporations not expressly or impliedly restrained by the nature of their undertaking may borrow money to carry out the legitimate objects of their incorporation, and secure the payment of it by a mortgage of their property.[2] Thus, for instance, a corporation organized for the purposes of manufacturing and supplying gas to the inhabitants of a city or village is under no restriction in this respect arising by implication from the nature of the business it was created to engage in.[3] This restriction upon the right of a corporation to alienate its property arises not from the fact that it subserves a public use, and is useful, or, it may be, necessary to the general public; but it applies only when the state, in view of the public purpose of a corporation, has conferred upon it special privileges, of which the right of eminent domain is generally the most important.

6. But the power to transfer corporate privileges and prop-

[1] See Australian Auxiliary Steamship Co. *v.* Mounsey, 4 K. & J. 733; 27 L. J. (Ch.) 729.

[2] Curtis *v.* Leavitt, 15 N. Y. 9; Straus *v.* Eagle Ins. Co. of Cincinnati, 5 Ohio St. 59; Monument National Bank *v.* Globe Works, 101 Mass. 57.

[3] Hays *v.* Galion Gas Light & Coal Co. 29 Ohio St. 330.

erty by way of mortgage is readily conferred by the legislature upon corporations having special privileges entrusted to them for public uses; or a mortgage made without such authority is usually confirmed by the legislature whenever such confirmation is asked for.[1]

An express power to mortgage would seem to negative any implied power for the same purpose, so that where there is express authority to give securities up to a certain amount, there can be no implied authority beyond this amount.[2] But an express authority to mortgage for certain purposes does not necessarily negative or qualify a general authority to borrow for other purposes for which the implied powers of a corporation are usually sufficient.[3] In general, it may be said that every private corporation has an implied power to borrow money and give its negotiable securities therefor, unless it be expressly or impliedly restrained by legislation; and it is only when the corporation attempts to pledge its privileges and property essential to its continued existence and fulfilment of its duties to the public, that it meets an implied restriction upon its action.[4]

A corporation authorized by its charter or by statute to execute a mortgage is the proper judge whether the exigency of its affairs and interest demand the exercise of this right; and a creditor of the company cannot interfere with the making of such mortgage unless he can show that his rights will be prejudiced by it.[5]

7. The authority to mortgage the franchise need not be given in express terms. — It is sufficient if it appears by a reasonable implication from a special statute that the legislature intended to authorize such a conveyance.[6] But whether a statute referring only to property will authorize a mortgage of franchises may well be questioned.[7]

In a case before the District Court of the United States for In-

[1] Richards *v.* Merrimack & Conn. River R. R. Co. 44 N. H. 127; Kennebec & Portland R. R. Co. *v.* Portland & Kennebec R. R. Co. 59 Me. 9; Pierce *v.* Milwaukee & St. Paul R. R. Co. 24 Wis. 551; St. Paul & Pacific R. R. Co. *v.* Parcher, 14 Minn. 297.

[2] Brice on Ultra Vires, 2d Eng. ed. 273.

[3] Allen *v.* Montgomery R. R. Co. 11 Ala. 437; Mobile & Cedar Point R. R. Co. *v.* Talman, 15 Ala. 472; Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431.

[4] See Ch. viii.

[5] Reed *v.* Bradley, 17 Ill. 321.

[6] East Boston Freight R. R. Co. *v.* Eastern R. R. Co. 13 Allen (Mass.), 422.

[7] Dunham *v.* Isett, 15 Iowa 284. See Pollard *v.* Maddox, 28 Ala. 321.

diana, it was questioned whether a railway company whose charter merely authorized it to mortgage its "road, income, and other property," could mortgage its franchises. But whether the company had power to mortgage its franchises or not, it could make a valid mortgage of the road itself, its tolls, income, and real estate.[1]

A railway company authorized by its charter to borrow money, and to execute "such securities, in amount and kind," as it might deem expedient to secure such loans, has been held to be authorized to mortgage its entire road, with its franchises, and all its property, as well all future acquisitions for the use of the road, as the property it then had in possession.[2]

A statute of the State of Mississippi authorizing the Southern Railroad Company to buy out and absorb the Vicksburg and Jackson Railroad Company expressly empowered it to issue its bonds secured by mortgage of the real and personal property of the road, its "appurtenances and franchise;" and to use such bonds in paying the indebtedness growing out of the purchase of the latter road, or in the construction of the unfinished portion of that road, or in such other way as the company might desire. This was considered as giving ample authority for making a mortgage of its franchise and property.[3]

A railroad company which has the power to sell its property may mortgage it. Thus, a charter conferring the right "to acquire, aliene, transfer, and dispose of property of every kind," confers the power to mortgage it. But this is affirmed of the property of the company as distinguished from its franchises.[4]

8. Legislative authority to mortgage may apply to the property of a corporation and not to its franchises. — If a corporation, having power by its charter to pledge "its property and profits," executes a mortgage covering not only these, but also its franchise to be a corporation, such mortgage is not for that reason entirely void, but it operates to convey the property of the company. A mortgage, however, of "all the present and future to be acquired property of the company, and all its estate and franchises," followed by an enumeration of the property and

[1] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35.

[2] Pierce *v.* Milwaukee & St. Paul R. R. Co. 24 Wis. 551.

[3] McAllister *v.* Plant, 54 Miss. 106.

[4] McAllister *v.* Plant, 54 Miss. 106.

rights intended to be conveyed, may be so limited and explained by such enumeration as to be brought within the limits of such legislative authority.[1]

A mortgage may be valid in part and in part void. Thus, if a corporation mortgages its property and franchises when it has no power to transfer its franchises, but is not restrained by law in respect to transfers of its property, the mortgage may effectually pass the property, while it is ineffectual to transfer its franchises.[2] Under a statute providing that corporations for manufacturing, mining, mechanical, or chemical purposes shall not mortgage any property except real estate, and shall not do this except to secure the payment of debts, a mortgage by such corporation to secure bonds is valid so far as the bonds are used for the payment of its debts, even though invalid so far as the bonds are used to raise money to carry on its operations.[3] It is doubtless true that the bonds not used for this purpose would be valid in the hands of *bonâ fide* holders; and that as against such holders, the company would be estopped from claiming the invalidity of the mortgage.

9. The scope and purpose of the power conferred must be substantially met in its exercise. — Under a statute authorizing any railroad corporation to borrow money "for completing, furnishing, and operating its road," and to issue bonds therefor, secured by a mortgage of its property and franchise,[4] a mortgage which appeared upon its face to be "made to consolidate its funded debt, obtain the money and material necessary for perfecting its line of railway, enlarging its capacities, and extending the facilities thereof," is within the scope of the powers conferred. Without other proof of the object of the mortgage, no suit to restrain the making of it, or the issuing of bonds under it, can be maintained by a common stockholder, or by a preferred stockholder of the corporation. For aught that appears in the case, the funded debt and other debts may have been incurred in constructing and operating the road, and the excess of money sought to be obtained by such bonds may be necessary further to complete and operate

[1] Butler *v.* Rahm, 46 Md. 541.

[2] Carpenter *v.* Black Hawk Gold Mining Co. 65 N. Y. 43; Central Gold Mining Co. *v.* Platt, 3 Daly (N. Y.), 263.

[3] Carpenter *v.* Black Hawk Gold Mining Co. *supra.*

[4] 2 R. S. N. Y. 1875, p. 532; Pt. I. ch. 18, tit. 15, § 39; Laws 1850, ch. 140, § 28.

the same.[1] If the power to make such mortgage exists, a common stockholder cannot restrain the making of it; and a preferred stockholder stands in no better condition, because if his right to receive interest is subject to the payment of the interest on all the mortgages of the company, whether made before or after the issuing of the stock, he could not object to the making of a new mortgage for a new indebtedness; and certainly he could not object to a mortgage which consolidated the funded debts of the company, or which embraced subsequent indebtedness with such debts. If, on the other hand, the preferred stockholder be entitled to interest on his preferred stock, subject only to the payment of interest on the mortgages then existing, his rights would remain unaffected by the issuing of subsequent mortgages.

It has been suggested that a mortgage of a railway and its franchise, made without legislative authority is not wholly void and inoperative, but that a Court of Equity may give effect to such an instrument, at least to the extent of treating it as a good equitable charge upon the net earnings of the railroad.[2]

10. Authority to mortgage for the purpose of constructing a railroad confers no right to secure by mortgage the debt of another. — A railroad company having authority to borrow such sums of money as might be expedient for completing, maintaining, and working the railway, and to make bonds, debentures, or other securities, and sell the same, and to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the company, for the due payment of such sums and the interest thereon,[3] cannot make a mortgage for any purpose not embraced in the terms of the act, and therefore cannot make a mortgage to secure a debt which is not a debt of the company. When the express purpose for which a mortgage is authorized to be given is the repayment of a loan of money for the completion or maintenance of the road, a mortgage to secure the debt of another, though it may be for the benefit of the company to make it, is *ultra vires* and void.[4]

[1] Thompson *v.* Erie Ry. Co. 42 How. (N. Y.) Pr. 68.

[2] Bickford *v.* Grand Junction Ry. Co. 1 Supreme Ct. of Canada, 696, 737, per Strong, J.

[3] Railway Act of Ontario, sec. 9, sub-sec. 11.

[4] Grand Junction Ry. Co. *v.* Bickford, 23 Grant's Ch. (Ont.) 302.

Although there may be no substantial divergence of opinion in relation to the correctness of these general principles, a wide difference will be noticed in the application of them by different courts rendering judgments in the case about to be noticed at length.

The Grand Junction Railway Company, having such authority to mortgage its property, entered into an agreement with a contractor for building its road, by which the contractor was to receive in payment certain municipal and other securities, and the balance in the first mortgage bonds of the company, upon the completion of the work. After building a portion of the road, the contractor was unable to procure iron for it, and the railway company, to enable him to obtain it, made a mortgage of a portion of its road to secure the notes of the contractor given for the price of the iron, with the provision that in case of his failure to pay the notes, the mortgagee's sole recourse should be against the property, and not against the company. The vendors of the iron retained a lien upon it until it should be laid on the track. The contractor, after laying a small part of the iron, became insolvent, and a large quantity of iron which had been delivered to him, but which had not been laid upon the road, was sold by the vendors at a large loss from the price at which the iron was purchased. The holders of the mortgage of the railway then sought to enforce it for the value of the iron actually laid upon the track, as well as for the loss resulting from the resale of the iron. The railway company, while not objecting to paying the price of the iron actually placed upon the road, objected to paying the loss arising from the resale; and contended that the mortgage was *ultra vires*.

The Court of Appeals of Ontario started with the principle, that without express legislative authority a mortgage of the corporate property of a railway company could not be made; and from this deduced the conclusion, that a mortgage, to be effectual, must be within the terms of the authority given to create it. The only authority this company had to mortgage its property was given to secure the repayment of money borrowed for the purpose of completing or maintaining the road; whereas, the debt secured by the mortgage in this case was that of the contractor. The mortgage was a pledge, by way of collateral security, that the contractor should pay his own debt; and the court regarded such a

mortgage as beyond the power of the company, and invalid, even if assented to, or ratified by, every stockholder. The court also declared that, inasmuch as the authority given to the company was to mortgage its property, tolls, and revenues, the company could mortgage only the whole undertaking, and that a mortgage of a portion of the line which the company was constituted to build was void.

On appeal from the judgment of the Court of Appeal of Ontario, the Supreme Court of Canada [1] reversed this judgment, and held the mortgage valid. The court start with the proposition that every corporation has the power to mortgage its property, unless this power be limited by its charter or by statute; although such limitation may be deduced either from the object of the corporation being limited to certain specific things, or from its property being subject to charges or trusts in favor of the public, with which a mortgage would be inconsistent. The statutes, however, confer express power to mortgage the company's property for the payment of loans and debentures. This statutory power to mortgage does not restrict the general power of the company incidental to its existence to deal with its property by way of mortgage.

The mortgage, moreover, was within the scope of the powers conferred upon the company to construct and work a railway. The iron rails, for the price of which the mortgage was given, were indispensable to enable the company to carry out its undertaking. The company might have purchased them directly from the vendors. It was found more convenient, however, to make a contract for the construction of the railway, by which the contractor undertook to furnish the iron. Having the power to give a mortgage to secure the price of rails, it can make no difference that they have given the mortgage as sureties for the contractor, and not as direct purchasers. Indirectly, it is given to secure the price of rails. "Had the mortgage been given for any object foreign to, or inconsistent with, the purposes of the incorporation, then, no doubt, it would have been *ultra vires* of the company. A familiar instance of a railway company exceeding the limits of its undertaking is afforded by a well known case, in which such a corporation added to its legitimate business that of a line of steamships. Had this mortgage been given in aid or furtherance

[1] Bickford *v.* Grand Junction Ry. Co. 1 Supreme Ct. of Canada, 696, 730.

of any similarly unauthorized enterprise, it would, of course, have been *ultra vires;* but it is manifest that such was not the case here, and that the sole object of the corporation was to attain the end for which it had been created." [1]

Furthermore the mortgage cannot be considered wholly void when it creates a good charge upon any part of the company's property, although it includes franchises and property which are so impressed with a trust in favor of the public that it is beyond the power of the company to deal with them. Conceding, say the court, that the mortgage, if confined to the franchise, and to the railway and its adjuncts, would have been void as being a charge on subjects *extra commercium*, it does not follow that it may not be a good charge on other lands over which the company had power of free disposition, and for that reason alone the order of the court below should be reversed.

Of this judgment of the Supreme Court of Canada, it may be remarked, that conceding its correctness as applied to the case in hand, it contains some general propositions and reasoning not in accordance with the best English and American authorities.

11. A mortgage without legislative authority of corporate property essential to the exercise of the corporate franchise, would seem on principle to be subject to the same objection that is made to a mortgage of the corporate franchise itself without such authority.[2] The adjudications upon this point are conflicting, though their weight is in favor of the proposition stated.

A mortgage made in pursuance of authority to borrow money on the credit of the undertaking, and to "assign and charge the property of the undertaking, and the rates and tolls, as a security for the money borrowed," was held not to include the land of the company. The mortgage followed the words of the power given to the company to raise money, assigning "the said undertaking, and all and singular the rates, tolls," &c.; Lord Denman, C. J., in his decision said: [3] "In my opinion there is nothing in those words to justify the construction that they contain a demise of the land, or of any portion of the real estate of the defendants.

[1] Bickford *v.* Grand Junction Ry. Co. *supra*, per Strong, J.

[2] Grand Junction Ry. Co. *v.* Bickford, 23 Grant's Ch. (Ont.) 302.

[3] Myatt *v.* St. Helen's, &c. Ry. Co. 2 Q. B. 364

Such a demise would not only be exceedingly improbable, but very inconvenient to the public, as it would perchance prevent the carrying on of the very "undertaking" by means of which the defendants were to be enabled to satisfy the demands of their creditors and to promote the convenience of the public."

Some cases on the other hand have held that a corporation may, without special authority, mortgage its lands and other property, in the course of its legitimate business, as it may deem expedient;[1] but these decisions are exceptional and are not followed.

12. **But land of a railway company not acquired under the delegated right of eminent domain,** or so connected with the franchise to operate and manage a railroad that the alienation would tend to disable the corporation from performing the public duties imposed upon it, and in consideration of which its chartered privileges have been conferred, may be conveyed or mortgaged by the company without special authority, under the general right of corporations at common law to dispose of whatever property they have power to acquire.[2] If the company should include in one deed or mortgage both real estate not connected with its franchises and real estate essential to the exercise and enjoyment of its franchises, as for instance a portion of its roadway, the conveyance might be upheld as to the former, and treated as inoperative and void as to the latter. The ordinary rule is applied, that if the part of the subject of the conveyance which is valid can be separated from that which is void, the conveyance will be carried into effect so far as it can be. As to property not acquired for the purposes of the road, the corporation stands in the relation of an ordinary trading corporation which has no public obligations.

The power of mortgaging land grants or surplus lands not needed for the permanent way, station-houses, or grounds required for the uses or purposes of the railroad, is one of the ordinary powers of a railroad company. This right of alienation extends to lands acquired in the exercise of compulsory powers as well as

[1] White Water Valley Canal Co. *v.* Vallette, 21 How. 414, per Campbell, J.; and see Shepley *v.* Atlantic & St. Lawrence R. R. Co. 55 Me. 395; Kennebec & Portland R. R. Co. *v.* Portland & Kennebec R. R. Co. 59 Me. 9, 23.

[2] Hendee *v.* Pinkerton, 14 Allen (Mass.), 381; Farnsworth *v.* Minn. & Pacific Ry. Co. 92 U. S. 49; Tucker *v.* Furgusson, 22 Wall. 572.

those obtained by purchase and government grant. It is a matter of common experience that upon the completion of a railroad the company finds itself in possession of land not required for the purpose of its working, which it may have been compelled to purchase as part of other property, or which purchased or taken as necessary for the use of the railroad has in the event been found to be superfluous. There is no ground for contending that such land is impressed with a public trust, so that the company cannot freely alienate it.[1] The retention of such lands can serve no possible purpose of public utility or public policy.

A power to mortgage conferred by statute upon a railroad company has reference only to such lands and property as the company could lawfully acquire, and cannot therefore include such as is not necessary to the purposes of the road. But a railroad corporation having authority to receive land in payment of subscriptions for stock, provided that so much of the land as may not be necessary for the use of the road shall be sold within a reasonable time, may mortgage such land, if the property be not thereby placed in such condition as to put it out of the power of the company to comply with the terms of the statute.[2]

13. **Authority to a railway company to mortgage its road is authority for its making a mortgage of a part of it.**[3] — But if the authority to execute a mortgage of a railroad indicates that the mortgage is to embrace the road as a whole, then it cannot be mortgaged in parts. Thus, a statute of the province of Ontario, authorizing railway companies to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property, for the purpose of completing, maintaining, and working their roads, was thought to prohibit by implication the creation of a mortgage upon a part of the line only.[4] A mortgage of an undertaking, or of the property of a railway company as a going concern, is a very different thing from a mortgage of a part of the specific property of a company, and confers very different rights. Notwithstanding the giving of such a mortgage, the interest of the public in the working and maintenance of the road is provided for, because the prop-

[1] Bickford *v.* Grand Junction Ry. Co. 1 Supreme Ct. of Canada, 696, 735.

[2] Taber *v.* Cincinnati, Logansport & Chicago Ry. Co. 15 Ind. 459.

[3] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35, 45.

[4] Grand Junction Ry. Co. *v.* Bickford, 23 Grant's Ch. (Ont.) 302, 354.

erty cannot be sold under foreclosure, and it is only by keeping the road in a condition to earn surplus revenue that the mortgagee can obtain any benefit from the security.[1]

14. A mortgage of its property and franchise, executed by a railroad corporation without previous legislative authority, is capable of being ratified and affirmed by the legislature, and rendered as valid and effectual as it would have been if executed under such previous authority.[2] Such a mortgage is not absolutely void, but voidable only. An act authorizing the trustees under such a mortgage to sell the road is such a ratification.[3]

Prior to the enactment of general laws authorizing mortgages by railroad companies, they were frequently made without legislative sanction in reliance that the legislature would afterwards confirm them; and there seems to have been no difficulty in obtaining such confirmation.

15. The franchise which a railroad company transfers by its mortgage is not its franchise to exist as a corporation, but only such of its franchises or privileges as will enable the grantee to have the same use and beneficial enjoyment of the property which the company itself had; and especially is this the case when the charter merely authorizes the company to mortgage "its means, property, and effects," without express mention of franchises. Mr. Justice Manning, in a recent case before the Supreme Court of Alabama,[4] upon this point said: "Strictly, 'the franchise to exist as a corporation' is not a corporate franchise, 'or franchise of the corporation,' at all. It is a franchise of the individual corporators, of the natural persons who are shareholders of the capital stock, and pertains to them as such corporators; whereby they are endowed with the privilege and capacity of being constituted into, and coöperating together, as a body politic, with power of succession, and without individual liability. And the corporation as such in its collective capacity, or by its board of directors, has no more power to sell this franchise thus pertain-

[1] See §§ 99–101.

[2] Shaw *v.* Norfolk County R. R. Co. 5 Gray (Mass.), 162 Richards *v.* Merrimack & Conn. River R. R. Co. 44 N. H. 127; Shepley *v.* Atlantic & St. Lawrence R. R. Co. 55 Me. 395; White Water Valley Canal Co. *v.* Vallette, 21 How. 414.

[3] Richards *v.* Merrimack & Conn. River R. R. Co. *supra.*

[4] Meyer *v.* Johnston, 53 Ala. 237, 325. See, however, Pierce *v.* Emery, 32 N. H. 484.

ing to the corporators individually, than it has to sell their paid-up shares of the capital stock. The interest of each of these in this franchise is transferred with his shares of stock, and passes with them from one individual to another; and this is the proper mode of parting with and acquiring this particular privilege. A railroad company may continue to exist as a corporation after its railroad, with all its appurtenances, has been sold away from it. There may be other property to dispose of, or credits to get in, or obligations to be discharged, or interests to be protected, which require its continued existence, and which may not belong to, or be chargeable upon, the persons who were purchasers of its railroad and the franchises necessary for the maintenance and operation of it. And on the other hand, those purchasers might not desire to be constituted into a corporation at all. Or, if they did, it might be very inconvenient to find themselves composing the same body politic, whose property had just been sold to them for the payment of some of its debts. For it would seem that if with the railroad they acquired also the company's 'franchise to be a corporation,' with the same faculties and name, by virtue of and with which the former body existed, they acquired it to be assumed and used, and so must themselves become that corporation, and be bound to perform its obligations."

The mortgage of a railroad, or a sale under the mortgage, does not necessarily work the dissolution of the corporation. It may be ground of forfeiture if insisted upon by the state, but this is a matter between the state and the corporation with which third persons have nothing to do.[1]

A corporation having authority to borrow money, and secure the payment of it by mortgage of "the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof," cannot mortgage the franchise to be a corporation appertaining to the individual members of the corporation, but can mortgage the franchise to maintain the railroad and secure compensation for the transportation of persons and property, and can mortgage property connected with the railroad, whether real or personal, then owned by it, or subsequently to be acquired, and the use of its franchise.[2]

16. The franchise to be a corporation is not necessarily

[1] Arthur *v.* Commercial & Railroad Bank of Vicksburg, 9 S. & M. (Miss.) 394.

[2] Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372.

included, if it ever be included, in a mortgage by a railroad company of its road and franchises. The right to build, own, manage, and run a railroad, or take the tolls thereon, is not of necessity of a corporate character, or dependent upon corporate rights.[1] It may belong to, and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable. "To the suggestion that the assignees can obtain and enjoy the fruits of this mortgage only in virtue of the continued existence and organization of the corporation, and the corporation, having parted with rights that are indispensable to its fulfilling the ends for which it was created, would no longer be entitled to continue, and so the end for which it was created would be defeated, it seems sufficient to say, that whether its potential existence and its organization would continue or not would depend on whether it should have subjected itself to a forfeiture of existence, by the failure to answer the purposes for which it was created, in the matter of its duties to the public. So long as these duties should be performed, would not the claim of the public, as well as of individuals, be fully answered? And is it to be presumed in anticipation, that the assignees will fail to perform those duties as fully as the corporation would have done, when the same motives exist and would be operative upon the assignees as upon the corporation, and when the same remedies may be made available, both in favor of the public and of individuals, for a failure to operate the road, — namely, as to the public, a forfeiture of the rights granted by the charter, and in favor of individuals, a reverter of the land constituting the roadway?"[2]

The Vermont Central Railroad Company conveyed in trust and mortgage to trustees, to secure the payment of its bonds, its railroad and franchise, "with all the lands thereto belonging and intended for the use and accommodation of said road." Subsequently a creditor recovered judgment against the company, and levied his execution upon certain lands which were not then used for the accommodation of the road; but the trustees claiming the land under the mortgage, a bill in equity was brought to remove such claim, and relieve the title from this cloud. It was held[3] that only such land passed by this conveyance as was so connected

[1] Bank of Middlebury *v.* Edgerton, 30 Vt. 182, 190; Miller *v.* Rutland & Washington R. R. Co. 36 Vt. 452, 498.

[2] Per Barrett, J., in Miller *v.* Rutland & Washington R. R. Co. *supra.*

[3] Eldridge *v.* Smith, 34 Vt. 484, 489.

with the railroad, and used for it by the company, that it would have been authorized to take the land compulsorily under its charter; although if so connected and used, it was immaterial whether it was actually so taken or purchased by the company. To the argument of counsel, that the mortgage being of the franchise of the corporation, and therefore that all property owned by it, whether connected with the road or not, and whether covered by the language of the description or not, passed by the deed, Chief Justice Poland, delivering the opinion of the court, replied: "It is said that one of the franchises of all corporations is the power of being a body politic, of corporate existence, with rights of succession of members. Another is, its rights of representation in court by its corporate name, either as plaintiff or defendant. It has a general power, also, of acquiring, holding, and conveying property. In addition to these general corporate powers, this company was invested by the legislature with a power to build a railroad between certain points and to operate and manage the same, and take tolls and fares on the same for their own benefit and profit; and, to the extent of the proper necessities of the road, was authorized to exercise the sovereign power of the state, to sequester private property without the consent of the owners, by making compensation therefor. When a railroad company mortgages its road and appurtenances as a security for debt, and also its franchise, it is not to be understood as conveying its corporate existence, or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and support, manage and operate, the rail road, and receive the tolls and profits thereof for their own benefit."

In like manner a foreclosure sale of the property and franchises of a railroad company does not pass to the purchaser debts due the company. The corporate existence of the company is continued for the purpose of collecting such debts, as well as for other purposes.[1]

17. A less stringent doctrine as to the power of a corporation without legislative authority to mortgage its franchise and property prevails in some states. Thus, in Kentucky it has been held that a railroad company, authorized by its charter to borrow on its credit, but not expressly authorized to make a mort-

[1] Smith *v.* Gower, 2 Duv. (Ky.) 17.

gage of its property or franchises to secure the loan, yet had an implied power to do so; and that although it could not in such case mortgage its corporate existence, or any prerogative franchise conferred upon it, it might mortgage its right to build and use its road, for this is not a prerogative franchise.[1] Upon the foreclosure of such mortgage, a purchaser would take the road subject to the terms of the charter; but he would have power to hold and manage the road as an individual. Whether the road should be operated by an individual or a corporation was not regarded as a matter of any interest to the public; and it was urged that under the charter of a corporation a single person, by purchasing all its stock, could control the road as completely as if he owned it individually.

18. In a few instances the doctrine has been practically discarded that a railroad company can make a valid mortgage only by legislative consent given either before or after the mortgage. The argument that it is dangerous to the public interests to have the privileges conferred by a railroad franchise transferred to a new body by the action of the corporation itself, is declared to be of little weight, inasmuch as the active management of the corporation is liable to be changed at any time by the action of the stockholders; and that in all cases the influence of the original corporators is but a temporary matter.[2] The transfer of the franchise to new hands through a foreclosure of a mortgage is in fact a change no greater than may take place within the original corporation; and the public interests are as safe in such new hands as they were in the hands of the original corporators.

It is claimed that a railroad company cannot mortgage its property and franchise without legislative authority, because the franchise is conferred upon a particular body of men constituting the corporation, implying a special confidence in them to answer the trusts in behalf of the public. The Supreme Court of Vermont regarded this idea as altogether fanciful and theoretical, saying, in fact, that there is no such confidence; that from the nature of the case there could not be; for the reason, that who shall compose the corporation at any given time depends on the shareholders of the capital stock, — one set of men to-day; another to-

[1] Bardstown & Louisville R. R. Co. *v.* Metcalfe, 4 Met. (Ky.) 199.

[2] Shepley *v.* Atlantic & St. Lawrence R. R. Co. 55 Me. 395, 407, per Walton, J.; Kennebec & Portland R. R. Co. *v.* Portland & Kennebec R. R. Co. 59 Me. 9, 23.

morrow; some citizens of the state; some foreigners; that the true idea is, that the public relies, for its assurance that its rights will be duly protected, upon the fact that they *must* be, in order that the conferred privileges may be held and enjoyed by the corporation, of whomsoever composed, — not upon any personal confidence which the legislature has in an indiscriminate body of persons, — men, women, and children, citizens and foreigners, daily changing, who may become or cease to be stockholders at their own pleasure and without restraint.[1]

Mr. Justice Strong, of the Supreme Court of Canada, considered it an open question whether all the rights and privileges of a railroad corporation, save only its right to be a corporation, are not susceptible of alienation by mortgage or otherwise; whether it may not, for instance, mortgage or otherwise alienate its rights of taking lands, operating the road, taking tolls, and exercising the other rights and powers usually conferred on railroad companies, the transferees being subject to all the trusts and burdens in favor of the public which the original company was liable to.[2]

19. **Aside from mortgaging their franchises or property, corporations, like individuals, unless restrained by law, have the power to borrow money** and to acknowledge the indebtedness by giving therefor ordinary commercial obligations.[3] If the manner of borrowing be prescribed by statute, or the amount of loans be limited, or the obligations to be given for the money be specified, the implied power is to this extent controlled.

A railroad corporation having power to build a road and issue bonds and negotiate them to raise money, has authority to issue to contractors, in payment for work done, negotiable certificates of indebtedness payable in money or bonds. The payment of the expense of construction in bonds is a sale of them. Having contracted a legitimate liability, the corporation has undoubted authority to acknowledge it and to promise to pay it by a written obligation.

[1] Miller *v.* Rutland & Washington R. R. Co. 36 Vt. 452, 492, per Barrett, J.

[2] Bickford *v.* Grand Junction Ry. Co. 1 Supreme Court of Canada, 696, 738; citing Hall *v.* Sullivan, 21 Law Reporter, 138, per Curtis, J.; Wilmington Ry. Co. *v.* Reed, 13 Wall. 268.

[3] See §§ 99–101; West Cornwall Ry. Co. *v.* Mowatt, 12 Jur. 407; Australian Auxiliary Clipper Co. *v.* Mounsey, 4 K. & J. 733; Byron *v.* Metropolitan Saloon Omnibus Co. 8 De G. & J. 123; Imperial Land Co. of Marseilles *in re*, L. R. 11 Eq. 478.

On such a certificate, promising to pay a specified sum with interest, in bonds on demand, if the corporation does not on demand exercise its election to make payment in bonds, the creditor may recover the amount in money; payment in bonds being a privilege for the benefit of the corporation; but if this privilege be not taken advantage of at the proper time, the rule of damages is the principal sum and interest.[1]

20. Where corporations constituted for specific purposes are by statute limited in the amount of money they are permitted to borrow, or conditions are imposed upon them as to the manner in which they shall exercise their borrowing powers, if they borrow in amounts or in a manner unauthorized by law, the securities have no legal validity. Thus where a dock company was authorized by the special act to raise money on the security of the tolls and other property, and the mortgages were directed to be registered, and the company mortgaged to a contractor a quantity of tools, machinery, and materials used on the works, but the securities were not made in the form required by the act, or registered, it was held that the mortgage was void.[2] A restriction as to the amount a corporation may borrow, when it has no power to borrow other than that expressly conferred, as is the case with municipal corporations, would seem to be a condition a breach of which would render the securities void;[3] but if the corporation has a general power to borrow, even if there is no right of action upon securities in excess of the limit, the money lent may be recovered in assumpsit.[4] It may happen also that while a mortgage given by a corporation may be outside its power, the indebtedness incurred may be a valid obligation.[5] On the other hand the mortgage may be valid, being expressly authorized, while the acknowledgments of indebtedness secured, as for instance bills of exchange, may be prohibited, in which case the mortgage would be regarded as securing the debt for which the bills of exchange were given, and therefore not on that account invalid.[6] When corporations are restricted in their borrowing to

[1] Pusey *v.* N. J. West Line R. R. Co. 14 Abb. (N. Y.) Pr. N. S. 434.

[2] McCormick *v.* Parry, 7 Exch. 355; 21 L. J. (Ex.) 43.

[3] Gordon *v.* Sea Fire & Life Ass. Co. 1 H. & N. 599.

[4] Brice on Ultra Vires, 2d ed. 267; *In re* Pooley Hall Colliery Co. 21 L. J. N. S. 690.

[5] Holdsworth *v.* Mayor of Dartmouth, 11 A. & E. 490.

[6] Scott *v.* Colburn, 26 Beav. 276.

certain amounts, there is no doubt that when this is the case the power may be exercised again and again so long as the limit is not exceeded at any one time.[1]

The rights of *bonâ fide* holders of negotiable securities of corporations will be considered elsewhere, as also the circumstances under which corporations may be estopped from taking advantage of an irregular exercise of their borrowing powers; and reference is here made to these subjects merely to say that the rights of holders of securities issued in violation of restrictions imposed by statute may be secure, although the securities themselves were upon their first issue void.

21. **What are known in England as Lloyd's bonds** are obligations which purport to be issued by corporations for work done, or materials supplied for the purposes of the undertaking. They are generally issued in this way in order to avoid the limitation imposed by parliament as to the amount of money which a railway company is permitted to borrow. As such bonds are nothing more than an acknowledgment under seal of a debt due for a *bonâ fide* consideration, there is no reason to doubt their validity when given *bonâ fide* to contractors or others for work actually done.[2] The power to issue such bonds is liable to gross abuse;[3] and when not in fact issued for the purposes specified, they are void.[4] But the substance of the contract, rather than the form of it is, regarded. Thus, where a railway company, whose borrowing powers were not to arise until it had completed and opened a certain portion of its line for traffic, borrowed from another railway company money sufficient to enable it to complete the requisite portion of the line, under an agreement that the borrowing company would, when its borrowing powers arose, issue its debentures in repayment, it was held that there was nothing illegal in the contract, and that the debentures were valid to the extent of the sum actually advanced in payment of the contractor's accounts.[5]

In one respect Lloyd's bonds have an advantage over ordinary

[1] Brice on Ultra Vires, 2d ed. 266.

[2] White *v.* Carmarthen, &c. Ry. Co. 1 H. & M. 786; 33 L. J. Ch. 93; 1 Cox's Joint Stock Cas. 112.

[3] Hodges Law of Railw. 6th ed. 130.

[4] Chambers *v.* Manchester & Milford Ry. Co. 5 B. & S. 588; 33 L. J. (Q. B.) 268; Fountaine *v.* Carmarthen Ry. Co. L. R. 5 Eq. 316; 37 L. J. Ch. 429.

[5] See Bagnalstown *v.* Wexford Ry. Co. L. R. 4 Eq. 505.

mortgages and bonds, for they are not hampered by the provisions of law applicable to securities regularly issued, which place all such obligations upon an equality whenever issued. The holders of these irregular bonds can sue upon them and recover judgment, and issue execution against the corporation in the same manner as creditors may do upon ordinary debts.[1]

22. **A corporation may borrow from a director and mortgage its property to him** to secure the payment of the loan, and the transaction, when open, and otherwise free from blame, cannot be impeached.[2] There are three parties whose interests are affected by the transaction; namely, the lender, the corporation, and its stockholders. The directors represent the interests of the corporation and of the stockholders. Therefore when a director deals with his company, his obligation to candor and fair dealing is increased in the precise degree that his representative character has given him power and control, through the confidence reposed in him by the stockholders, who appointed him their agent. This obligation would be still stronger with a sole director, or with one of a very small number vested with the management of the company, and his acts would be subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and by their freedom from ingredients of selfishness. But at the same time, a director is more than any one else interested in aiding the corporation judiciously, and is best qualified to judge of the necessity of that aid, and of the extent to which it may be safely given. A loan, therefore, honestly made by a director for the benefit of the corporation, both in the rate of interest and in the security taken, is valid originally, whether liable to be avoided afterwards or not.

23. **A corporation may be estopped from setting up** the defence of *ultra vires* to its obligation in the hands of a holder in good faith for value, who cannot be presumed to have had any knowledge of the want of authority to make the contract. Of course, if the contract be absolutely prohibited by the charter of incorporation, or by a general statute, or if the law implies such a prohibition from the purposes for which the corporation was cre-

[1] Cork & Youghal Ry. Co. L. R. 4 Ch. App. 748.

[2] Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587.

ated, all persons dealing with it are bound to take notice of the extent of the company's powers. But when there is no apparent want of power in the corporation to incur the obligation, whether note, bond, or mortgage, and there is nothing on the face of the paper, by which the debt is evidenced, showing that the company has overstepped the limits of its power, the corporation is estopped from denying that which, by assuming to make the contract, it had virtually affirmed.[1]

24. **When the authority to mortgage is coupled with a condition for the benefit of the state,** the state alone can enforce it. An act authorizing a company to borrow money and mortgage its property to secure the payment of it, upon condition of paying or securing certain bonds issued to the company by the state, when accepted by the company, is a contract between the company and the state, but is not a contract between the company and the holders of the state bonds referred to, and they cannot maintain an action thereon against the company. There was originally no relation of debtor and creditor between the company and the bondholder, and the act did not create any such relation. Upon the failure of the company to fulfil the condition on which the privilege accorded by the act was granted, it became amenable to the state and not to strangers to the contract.[2]

25. **Forfeiture of the charter of a corporation.** — When the charter of a railroad company provides that unless the road be completed by a certain day the company shall forfeit to the state its corporate franchises and rights, together with its road and all its property, and the company having authority by its charter to issue bonds secured by mortgage exercises this power, but failing to complete the road, the state proceeds to declare the charter forfeited, and to take possession of the road and turn it over to persons who originally subscribed money for it, the state takes the property and franchises free from the incumbrance of the mortgage. The authority to make the mortgage and the condition of forfeiture, being parts of the same statute, must be construed to-

[1] Hays *v.* Galion Gas Light & Coal Co. 29 Ohio St. 330; Bissell *v.* Mich. South. & North. Ind. R. R. Co.'s 22 N. Y. 289; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57. See Chapters vi., vii.

[2] Stuart *v.* James River & Kanawha Co. 24 Gratt. (Va.) 294.

gether. If the act should be construed as investing the company with the right to aliene or mortgage all its franchises, rights, and property, free from the right of the state to declare a forfeiture of the same, the act would be in part nullified ; for in that case the very property which is to be forfeited to the state becomes vested in others by the mortgage, and nothing is left upon which the forfeiture could operate. The idea that only the equity of redemption is subject to forfeiture is also repugnant to the provision that the road and all its property shall be forfeited.[1]

Of course such a provision for the forfeiture of the charter of a company would, if known, prevent the sale of the company's funds in the market. The loan could be disposed of only to persons having a personal interest in the company, or personal confidence in its officers. Whether purchasers of such bonds had actual notice of the restriction of the company's power of executing a mortgage or not, they would in law be chargeable with such notice. They must be presumed to know the conditions annexed to the grant of power made by the charter or statute under which the corporation was organized. The purchasers of such bonds cannot claim the position of *bonâ fide* holders without notice of the rights and equities of the state.

II. *Statutes authorizing Railroad Companies to mortgage their Property and Franchises.*

26. General statement. — In recognition of the doctrine that legislative authority is essential to the making of a valid mortgage by a corporation chartered for public purposes, and to this end, having important privileges granted them, general laws have been enacted in almost all the American States conferring upon railroad corporations the power to mortgage their property and franchises. These corporations are so numerous and their functions so important, not only has the public convenience demanded that there should be general laws upon the subject doing away with the necessity of special legislation, so often as such corporations may have occasion to exercise this power, but also has the public welfare demanded that the authority conferred should be uniform, and that it should be regulated and restricted in a uniform manner.

[1] Silliman *v.* Fredericksburg, Orange & Charlottesville R. R. Co. 27 Gratt. (Va.) 119.

A statement of the statutes upon this subject in the several states is given because they are the foundation of most of the railroad mortgages now existing in this country, and will be the foundation of many others yet to be made. That similar statutes do not exist in relation to mortgages by other corporations arises from the fact that there are very few other corporations that stand in the same relation to the public that railroad companies do, having corporate privileges which they cannot transfer. In the few instances of corporations having similar public duties and privileges, such for instance as canal companies, special legislation is adequate. In a few states, authority to mortgage is still given to railroad companies by charter or by special act.

Not less important than legislative authority to railroad companies to give mortgages of their property and privileges is legislative authority to those who may become purchasers under such mortgages to organize themselves as corporations, so that they can adequately use and enjoy what they have purchased; and, accordingly, statutes for this purpose have been enacted in nearly all the states. These will be given in a subsequent chapter.[1]

27. **Alabama.**[2] — Any railroad corporation may borrow money to an amount not exceeding its authorized capital stock, at a rate of interest not greater than seven per cent., and may execute bonds or promissory notes therefor in sums of not less than one hundred dollars, and, to secure the payment thereof, may pledge or mortgage the personal and real property and income of such company, together with its franchise; and any such mortgage, deed of trust, or other security, vests in the mortgagee or trustee full power to sell and convey the road-bed, franchise, income, or other property conveyed in accordance with the provisions of such mortgage, deed of trust, or other security.[3]

Any railroad company in the state may sell, negotiate, mortgage, or pledge its bonds or notes, as well as any bonds, notes, scrip, or certificates, for the payment of money or property, which it may have received as donations, or in payment of subscriptions to its capital stock, or for other dues, at such time and such places, either within or without the state, and at such rates

[1] Ch. xxiii.

[2] Code 1876, §§ 2048, 2049, 2051, 2052.

[3] Mortgages and deeds of trust executed before January 1, 1860, and sales under them made before the 21st day of February, 1860, are legalized and declared valid, upon certain conditions, § 1053.

or prices as it may deem conducive to its interests; and if such notes or bonds are sold at a discount, they and the securities for their payment are as valid as if the sale had been at par.

But the Constitution of the state prohibits the issuing of stock or bonds by any corporation except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness is void. The stock and bonded indebtedness shall not be increased, except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock, first obtained at a meeting to be held after thirty days' notice given in pursuance of law.[1]

28. Arkansas.[2] — A railroad company has power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest not exceeding seven per cent. per annum, and to execute its bonds therefor, in sums of five hundred or one thousand dollars, and to secure the payment thereof may pledge the property, both real and personal, and income of such company, and may execute a deed of mortgage or other instrument of writing; and such company is authorized to sell, negotiate, pledge, or mortgage such bonds for the benefit of such company, and at such times and in such places, either within or without this state, and at such rates and for such prices as, in the opinion of the directors of the corporation, will best advance the interests of such company. The Constitution of the state prohibits the issuing of bonds except for money or property actually received or labor done, and all fictitious indebtedness is declared void. The bonded indebtedness cannot be increased except in pursuance of general laws, nor until the consent of the persons holding the larger amount in value of stock shall be obtained, at a meeting held after notice given, for a period not less than sixty days, in pursuance of law.[3]

29. California.[4] — Any railroad corporation may borrow, on the credit of the corporation, and under such regulations and re-

[1] Constitution of 1875, art. xiii. § 6; Code 1876, p. 148. For manner of giving notice, &c., see §§ 2031–2035 of Code.

[2] Dig. 1874 sec. 4970; Act of Jan. 22, 1855, § 7.

[3] Const. of 1874, art. xii. sec. 8.

[4] Civil Code, §§ 456, 457, Codes & Stat. 1876, §§ 5456, 5457.

strictions as the directors thereof, by unanimous concurrence, may impose, such sums of money as may be necessary for constructing and completing its railroad, and may issue and dispose of bonds or promissory notes therefor, in denominations of not less than five hundred dollars, and at a rate of interest not exceeding ten per cent. per annum; and may also issue bonds or promissory notes, of the same denomination and rate of interest, in payment of any debts or contracts for constructing and completing the road, with its equipments and all else relative thereto. The amount of bonds or promissory notes issued for such purposes must not exceed, in all, the amount of the capital stock; and to secure the payment of such bonds or notes, it may mortgage its corporate property and franchise. The directors must provide a sinking fund to be specially applied to the redemption of such bonds on or before their maturity, and may also confer on any holder of any bond or note so issued, for money borrowed, or in payment of any debt or contract for the construction and equipment of such road, the right to convert the principal due or owing thereon into stock of such corporation, at any time within eight years from the date of such bonds, under such regulations as the directors may adopt.

30. Colorado.[1] — Any railway corporation has the power from time to time to borrow such sums of money as may be necessary for completing, furnishing, improving, or operating its railway, and to issue and dispose of its bonds, for any amount so borrowed, and to mortgage its corporate property and franchise to secure the payment of any debt contracted by such corporation, for the purposes aforesaid, in such manner as the shareholders representing a majority of the stock of any such corporation may direct.

The Constitution of the state provides that no corporation shall issue stock or bonds except for labor done, services performed, or money or property actually received, and that all fictitious increase of stock or indebtedness shall be void.[2]

31. Connecticut.[3] — Every railroad company may borrow money, and may secure the repayment of the same by its bonds, signed

[1] Gen. Laws 1877, §§ 301, 306.

[2] Const. 1876, art. xv. sec. 9.

[3] Gen. Stat. 1875, pp. 332, 333.

by its president and countersigned by its treasurer; but before being issued, the bonds shall be registered in the office of the controller, and a certificate thereof shall appear on the face of each bond; and the controller shall cancel any bonds so registered, which may be brought to him for that purpose, and enter said act of cancelling in his register; but no railroad company shall issue any bond of a less denomination than one hundred dollars, nor have bonds outstanding at any one time to a greater amount than one third of the sum which its president and chief engineer shall certify, under oath to the controller, has been actually expended upon its road; and any false swearing in this matter shall be perjury; and the controller shall not permit the bonds of any railroad company, registered in his office and uncancelled, to exceed the amount limited in this section. The company may dispose of its bonds as its stockholders may authorize. The company may secure such bonds by a mortgage of its property, or any part thereof, by deed duly executed by its president, under the corporate seal, to the treasurer of the state and his successors in office, in trust for the holders of said bonds, and recorded in the office of the secretary of this state. It may include in such mortgage all or any part of its rolling stock, locomotives, and cars, whether then owned by it or thereafter acquired; and such mortgage is valid and effectual as to all property so included, and may be foreclosed in the same manner as ordinary mortgages of real estate.[1]

32. Dakota Territory.[2] — Every railroad corporation has power to mortgage or execute deeds of trust of the whole or any part of its property and franchises, including any lands or other property granted to such corporation by the United States, to secure money borrowed by it for the construction and equipment of its road, and may issue its corporate bonds in sums not less than five hundred dollars, — secured by such mortgages or deeds of trust, — payable to bearer or otherwise; and if payable to bearer, negotiable by delivery, bearing interest at a rate not to exceed ten per cent. per annum, convertible into stocks, and may sell them at such rates or prices as it may deem proper; and if such bonds be sold below their nominal or par value, they are valid and bind-

[1] Acts 1877, c. 38.

[2] Rev. Codes 1877, pp. 303 and 304; Civil Code, §§ 464, 465.

ing upon the corporation, and no plea of usury can be put in or allowed in behalf of such corporation in any action or proceedings upon the same; the principal and interest upon such bonds, or either of them, may be made payable within or without the territory. Such corporation has power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor, and, to secure the payment thereof, may pledge its property and income.

33. Delaware. — There is no general statute in this state for the organization of railroad companies; but these are created by special acts which provide for their borrowing money and mortgaging the corporate property and franchises as security.

34. District of Columbia.[1] — Any railroad company may, from time to time, borrow such sums of money as it may deem necessary for completing or operating its railroad, and issue and dispose of its bonds for any amounts so borrowed, for such sums and at such rates of interest as may be agreed upon, and mortgage its corporate property and franchises to secure the payment of any debt contracted by the company; and the directors of the company may confer on any holder of any bond issued for money so borrowed, the right to convert the principal due or owing thereon into stock of the company, at any time not exceeding fifteen years from the date of such bond, under such regulations as the company may adopt; and the company may sell its bonds whenever it may deem proper, and such sales will be as valid as if such bonds should be sold at par value. But such corporation shall not have power to issue any bonds or to execute any mortgages upon its property or franchises, until at least one half of the capital stock shall have been fully paid.

35. Florida.[2] — Among the general powers of all corporations is included the right to hold, buy, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its articles of incorporation.

The general railroad law[3] provides that every corporation

[1] Rev. Stat. 1874, § 644.

[2] Bush's Dig. 1872, p. 165.

[3] Laws 1874, ch. 1987, sec. 9, par. 10.

formed under that act shall be empowered to borrow such sum or sums of money at such rates of interest and upon such terms as such company or its board of directors shall authorize or agree upon, and may deem necessary or expedient, and may execute one or more trust deeds or mortgages, or both, if occasion may require, and any railroads, canal or canals, constructed or in process of construction by said company for the amount or amounts borrowed or owing by such company, as its board of directors shall deem expedient; and such company may make such provisions in such trust deed or mortgage as it may think proper for transferring its railroad track or canal, right of way, depots, grounds, rights, privileges, franchises, immunities, machine houses, rolling stock, furniture, tools, implements, appendages and appurtenances used in connection with such railroad or railroads, canal or canals, in any manner whatsoever then belonging to said company, or which shall thereafter belong to it, as security for any bonds, debts, or sums of money that may be secured by such trust deed or mortgage.

36. Georgia. — Railroad companies are organized under special charters, which provide for their borrowing money and mortgaging the corporate property and franchises as security.

37. Illinois.[1] — Any railroad company has power from time to time to borrow such sums of money as may be necessary for completing, finishing, improving, or operating its railway, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted by such corporation for the purposes named; but the concurrence of the holders of two thirds in amount of the stock of such corporation is necessary to the validity of any such mortgage; and the order or resolution for such mortgage must be recorded in the office of the recorder of deeds in each county, through or into which such railway is proposed to be run, and in the office of the secretary of state; and the directors of such corporation are empowered, in pursuance of any such order or resolution, to confer on any holder of any bond for money so borrowed as aforesaid the right to convert the

[1] Rev. Stat. 1877, ch. 114; § 20, and see §§ 30–33 as to loans by companies formed prior to March 1, 1872, which may be made in similar manner.

principal due, or owing thereon, into stock of such corporation, at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation. The Constitution, however, prohibits the issuing of stock or bonds by any railroad corporation, except for money, labor, or property actually secured, and applied to the purposes for which such corporation was created; and all fictitious stock or indebtedness is void.[1]

38. Indiana.[2]— Any railroad company may, from time to time, borrow such sums of money as it may deem necessary for completing or operating its railroad, and issue and dispose of its bonds for any amounts so borrowed, for such sums and at such rate of interest as is allowed by the laws of the state where such contract is made, and mortgage its corporate property and franchise to secure the payment of any debt contracted by such company; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time not exceeding fifteen years from the date of said bond, under such regulations as the company may adopt; and such company may sell its bonds, either within or without the state, at such rates and prices as are permitted by law, and such sales are as valid as if such bonds had been sold at par value.

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39. Iowa.[3]— Any railway corporation has power to issue its bonds for the construction and equipment of its railway, in sums not less than fifty dollars, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per cent. per annum, and to make the same convertible into stock, and to sell the same at such rates or prices as is deemed proper; if such bonds are sold below the par value thereof, they nevertheless are valid and binding, and no plea of usury is allowed such corporation in any action or proceeding brought to enforce the collection of said bonds; such corporation may also secure the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its property and franchises.

[1] Constitution of 1870, art. 11, § 14.

[2] Revision 1876, vol. 1, p. 706; Act of May 11, 1852.

[3] Code of Iowa, 1873, §§ 1283, 1284, 1286, 1287, 1301.

Such mortgages or deeds of trust may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired, and are as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof.

Any such corporation, with the assent of two thirds of all the stockholders in interest, may issue, in payment of debts, preferred stock, not exceeding ten thousand dollars for each mile of railway constructed, which stock shall be entitled to such dividends as the directors of the corporation may determine, not exceeding eight per cent. per annum, if the same is earned in any one year, after payment of all interest on the bonds of the corporation, before any dividend is made to the common stock.

Such preferred stock, and any income or mortgage bond of the corporation, shall, at the option of the holder, be convertible into common stock in such manner and on such terms as the board of directors thereof may prescribe; but the aggregate amount of the common and preferred stock shall not exceed the total amount of stock which the corporation may be by law, or the articles of incorporation thereof, authorized to issue. Any contract, lease, or benefit derived therefrom may be mortgaged for the purpose of securing construction bonds, in the same manner as other property of the corporation.

40. Kansas.[1] — Every railway corporation has power from time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railway, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted by the corporation for the purpose aforesaid.

41. Kentucky. — There is no general law for the organization of railroad companies. The power to borrow money and to mortgage the corporate property and franchises is conferred by the private charters.

42. Louisiana.[2] — In addition to the powers conferred by

[1] Dassler's Stat. 1876, vol. 1, p. 167.

[2] R. S. 1870, §§ 692, 693, 2396, 2397.

law upon railroad companies, any railroad company established under the laws of this state may borrow from time to time such sum of money as may be required for the construction or repair of any railroad, and for this purpose may issue its bonds or obligations, secured by mortgage upon the franchises and all the property of said companies, and payable at such times and places as the president and directors may designate, with power to sell, pledge, or otherwise dispose of said bonds, on such terms as the president and directors may deem expedient.

A mortgage so made by any company is binding in the several parishes through which a railroad may pass, by the record of the mortgage in such parishes, and such mortgage need not be reinscribed to continue it in force. The president and directors of any company may confer on the holder of any bond or bonds issued for money for the use of said company the right to convert the principal due thereon into the stock of said company at any time, not exceeding ten years from the date of said bond or bonds, under such regulations as the president and directors may adopt; but no increase in the capital stock of any railroad company shall be authorized or implied from this provision.

Any railroad company established under the laws of this state may, to secure the payment of any obligation contracted by such company for the construction of the road, mortgage its road, in whole and in part;[1] and such mortgage, if made of the entire road, shall bear upon the entire road, though the same be not completed at the time the mortgage was made; and such mortgage may also be made to bind the appurtenances of said road, its warehouses, depots, water stations, locomotives, and the like.

A mortgage made by any of the companies binds the road, its warehouses, depots, water stations, locomotives, and other appurtenances that may be mortgaged in the several parishes where the same may be, only by the record of the mortgage in each parish, but such mortgage need not be reinscribed to continue it in force.

43. Maine.[2] — A railroad corporation, to obtain money to build or furnish its road, or to pay debts contracted for that purpose, may issue its bonds in sums not less than one hundred dollars,

[1] Ibid. §§ 726, 727, 2427, 2428.

[2] R. S. 1871, p. 454; Acts 1871, ch. 198.

bearing interest secured in such manner as it deems expedient, and binding upon it though sold at less than par value, and no defence of usury can for that cause be admitted.

44. Maryland.[1] — A railroad company has power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest to be agreed upon by the respective parties, and may execute bonds or promissory notes therefor, in sums of not less than one hundred dollars, and, to secure the payment thereof, may pledge the property and income of such company. The power of a railroad company to mortgage its property without legislative authority has never been recognized by the courts. It has been repeatedly held, however, that without such authority a railroad company cannot lease or aliene its road or other property.[2]

45. Massachusetts.[3] — Any railroad corporation, by a vote at a meeting called for the purpose, may issue bonds to provide means for funding its floating debt, or for the payment of money borrowed for any lawful purpose, and may mortgage or pledge as security for the payment of such bonds any part or all of its road, equipment, or franchise, or any part or all of its property, real or personal. Such bonds may be either "coupon bonds," or "registered bonds," as may be determined by such vote, in sums of not less than one hundred dollars each, payable at periods not exceeding twenty years from the date thereof, and bearing interest not exceeding the rate of seven per centum a year, payable annually or semi-annually, to an amount which, including that of bonds previously issued, shall not exceed for the aggregate of all bonds, whether registered or coupon, the capital stock of the corporation actually paid in at the time the bonds are issued. They must be recorded by the treasurer in books to be kept at his office. No bond shall be issued unless approved by some person appointed for that purpose, who shall certify that it is properly issued and recorded as aforesaid.

[1] Laws 1870, p. 903.

[2] State *v.* Consolidation Coal Co. 46 Md. 1, 10.

[3] Acts 1874, ch. 372, §§ 49, 50, 51, 52; Acts 1875, ch. 58. For previous statutes see Acts 1854, ch. 286; G. S. 1860, ch. 63, §§ 120–123. Bonds issued in violation of these statutes are void. East Boston Freight R. R. Co. *v.* Hubbard, 10 Allen (Mass.), 459; Commonwealth *v.* Smith, Ib. 448.

At the request of the owner or holder of any coupon bonds lawfully issued, other than bonds, the payment of which has been or shall be guaranteed by the Commonwealth, the railroad corporation which issued such coupon bonds may issue registered bonds in exchange for and in lieu of them, upon such terms and under such regulations as may be prescribed by the directors of the corporation, with the consent and approval of the trustees, to whom any mortgage or pledge shall have been executed; and such registered bonds shall, with the exception of the coupons, correspond in all respects with the coupon bonds for which the same are exchanged, and shall be in conformity with all laws authorizing the issue of the coupon bonds. Such exchange shall not affect any mortgage or pledge given as security for the payment of such coupon bonds, and such mortgage or pledge shall remain in full force as security for such registered bonds; and the coupon bonds shall be cancelled and destroyed at the same time that the registered bonds are issued in lieu thereof.

No railroad corporation which has previously issued bonds shall subsequently make or execute any mortgage upon its road, equipment, and franchise, or any of its property, real or personal, without including in and securing by such mortgage all bonds previously issued, and all preëxisting debts and liabilities of the corporation.

All bonds or notes issued by a railroad corporation shall be binding and collectible in law, notwithstanding such bonds or notes were negotiated and sold by the corporation or its agents at less than par.

No railroad corporation shall hereafter issue any bonds, coupon notes, or other evidences of indebtedness, payable at periods of more than twelve months from the date thereof, except as above provided.[1]

A railroad corporation can take or guarantee the bonds of another corporation, only by special authority of the legislature, except that a railroad corporation may guarantee, to an amount not exceeding five per centum of its capital, the bonds of any corporation of this state, formed for the purpose of carrying freight, passengers, and mails between any part of the Commonwealth and Europe; or it may, upon adequate security, issue its own bonds to the same amount; except, also, that each of two com-

[1] Acts 1876, ch. 170, § 1.

panies having connecting roads may guarantee the bonds of the other upon such terms and to such an extent as may be authorized at a meeting called for the purpose, provided the bonds so guaranteed do not exceed the amount of the capital stock of such other corporation actually paid up in cash; or a railroad company may aid a branch or connecting road by taking its notes or bonds, secured by mortgage or otherwise, but not in excess of two per centum of its paid up capital stock, except by vote of the stockholders at a meeting called for the purpose.[1]

46. Michigan.[2] — Any company organized under the general railroad act has power from time to time to borrow such sums of money as may be necessary for completing, finishing, equipping, or operating its road, or any part thereof, or for paying any indebtedness necessarily incurred for completing, finishing, or operating its road, or any part thereof; and to issue and dispose of its bonds or obligations for any amount necessarily borrowed for such purpose, for such sums and for such rate of interest, not exceeding ten per cent., as it may deem advisable, and to mortgage its corporate property and franchises, and the income thereof, or any part thereof, to secure the payment of any debt contracted, or to defray any expenditure by the company for the purpose aforesaid. And the directors of any such company may confer on any holder of any such bond or obligation the right to convert the same into the stock of said company, at any time, not exceeding ten years from the date of said bonds, on such terms and under such regulations as the company may see fit to adopt; and said company may sell its bonds or obligations, either within or without this state, and at such rates and prices as they may deem proper.

47. Minnesota.[3] — The several railroad companies of this state have power to mortgage or execute deeds of trust of the whole or any part of their property and franchises, to secure money borrowed by them for the construction and equipment of their roads, and they may issue their corporate bonds in sums of not less than five hundred dollars, secured by such mortgages or deeds of trust, payable to bearer or otherwise; and if payable to bearer,

[1] Acts 1874, §§ 53–57.
[2] Laws 1873, p. 527.
[3] Stat. at Large 1873, vol. 1, p. 430; Act of March 5, 1868.

negotiable by delivery, bearing interest at a rate not to exceed ten per cent. per annum, and convertible into stock or not, as may be deemed expedient; and may sell them at such rates or prices as they deem proper; and if such bonds are sold below their nominal or par value, they are valid and binding on the company, and no plea of usury can be put in or allowed by said companies in any suit or proceeding upon the same.

Such mortgages or deeds of trust may, by their terms, include and cover, not only the property of the companies making them at the time of their date, but property, both real and personal, which may thereafter be acquired by them, and they are as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof.[1]

Any such corporation has the power to borrow money on credit of the corporation, and may execute bonds or promissory notes therefor, and to secure the payment thereof may pledge the property and income of the company; but the amount of the indebtedness or liability of such company, exclusive of its indebtedness secured by mortgage of its property, shall not, at any one time, exceed two thirds of the amount of its capital stock. Such corporation is authorized to issue bonds in lieu and in payment of any bonds of such company, or bonds issued and disposed of for the construction of its line of road, outstanding, bearing such rate of interest as may be agreed upon. In case the articles of association so provide, the corporation may admit into the board of directors as members thereof one or more persons, to be chosen by the bondholders, under such regulations as may be agreed upon between the trustees of the bondholders and such corporation.[2]

48. Mississippi. — There is no general railroad law in this state. Power to borrow and mortgage is conferred by the special charters or by special acts.

49. Missouri.[3] — Every railroad company has power from time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage the corporate property and franchises to secure the payment of

[1] Stat. at Large 1873, p. 431.

[2] Laws 1875, ch. 14, § 40.

[3] 1 Wagner's Stat. 1872, p. 298.

any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid the right to convert the principal due or owing thereon into stock of said company, at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

50. Montana Territory.[1] — Any railroad corporation has power to borrow money on the credit of the corporation, to an amount not exceeding its authorized capital stock, at a rate of interest to be agreed upon by the respective parties, and may execute bonds therefor in sums of not less than one hundred dollars, and secure the payment thereof by mortgage or pledge of the property and income of such corporation. And if the said mortgage shall so provide, it shall be and remain a valid lien upon all of the property of said company, of whatever kind then existing, or that may thereafter be by it acquired, irrespective of the law now in force relating to chattel mortgages, and the same shall be taken, held, and enforced in the same manner as mortgages upon real estate now are held and enforced.

51. Nebraska.[2] — A railroad corporation has power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor, and to secure the payment thereof may pledge the property and income of said company.

Every railroad company has power to mortgage or execute deeds of trust of the whole or any part of its property and franchises, including its lands or other property granted to said company by the United States, to secure money borrowed by it for the construction and equipment of its roads, and may issue its corporate bonds in sums not less than five hundred dollars, — secured by said mortgages or deeds of trust, — payable to bearer or otherwise, and, if payable to bearer, negotiable by delivery, bearing interest at a rate not to exceed ten per cent. per annum, and convertible into stock, or not, as shall be plainly expressed on the face of each and every bond so issued by said company, and may sell them at such rates or prices as they may deem proper; and if said bonds should be sold below their nominal or par value,

[1] Laws 1873, p. 102, § 14.

[2] Gen. Stat. 1873, ch. 11, §§ 84, 117, 118, 119.

they shall be valid and binding upon the company, and no plea of usury shall be put in or allowed in behalf of the company upon any suit or proceedings upon the same; the principal and interest upon such bonds, or either of them, may be made payable within or without this state.

Any mortgage or deed of trust made upon the lands, roads, or other property of any railroad company, shall bind and be a valid lien upon all the property mentioned in such deed or mortgage, including rolling stock; and the purchaser, under foreclosure of mortgage or trust deed, shall have and enjoy all the rights of a purchaser on execution sale.

The Constitution of the state provides that no railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock, dividends, and other fictitious increases of the capital stock or indebtedness of any such corporation shall be void. The capital stock of railroad corporations shall not be increased for any purpose, except after public notice for sixty days, in such manner as may be provided by law.[1]

52. Nevada.[2] — A railroad corporation has power to borrow from time to time on the credit of the corporation, and under such restrictions as two thirds in interest of the stockholders may impose, such sum or sums of money, not exceeding in all the amount of its capital stock, as may be necessary for the construction and equipment of its road, at a rate of interest not to exceed fifteen per centum per annum, and to execute bonds or promissory notes therefor, in sums not less than one thousand dollars in any one note or bond; and to secure such notes or bonds may mortgage its corporate property and franchise, and pledge the income of the company; and the directors of such company shall also provide, in such manner as may seem to them best, a sinking fund, to be especially applied to the redemption of such bonds on or before their maturity, and may also confer on any holder of any bond so issued for money borrowed, or in payment of any debt or contract for the construction or equipment of such road as aforesaid, the right to convert the principal due or owing

[1] Const. 1875, art. 11, § 5; art. 12, §§ 2, 3.

[2] Compiled Laws 1873, p. 292, § 3440.

thereon into stock of such company, at any time within six years from the date of such bond, under such regulations as the company may adopt.

53. New Hampshire. — There are no special provisions conferring upon railroad companies the power to make bonds and mortgages other than that they have the general powers given by law to other corporations. It is provided that all corporations may purchase, hold, and convey real and personal estate necessary and proper for the due transaction of their legitimate business to the amount authorized by their charters.[1] A railroad corporation may purchase, hold, and convey real estate, lying near to or adjoining its road, not exceeding in value five per cent. of its capital stock.[2] Bonds sold at a discount by a railroad company are not affected by the usury laws.[3] No sale or mortgage of a railroad is valid unless it be in writing, filed in the office of the secretary of state, and authorized by the legislature.[4]

54. New Jersey.[5] — Any company incorporated under the general railroad act has power to borrow such sum or sums of money, from time to time, not to exceed in the whole its paid-up capital stock, as shall be necessary to build, construct, or repair their road, and furnish all necessary engines and other equipments for the uses and objects of said company, and to secure the repayment thereof by execution, negotiation, and sale of any bond or bonds, secured by mortgage on the lands, privileges, franchises, and appurtenances of and belonging to the said company; but the company is not allowed to plead any statute or statutes against usury in any court of law or equity in any suit instituted to enforce the payment of any bond or mortgage executed under these provisions; and it is provided further, that said bonds shall constitute a first lien on the railroad, its cars, real estate, and franchises, and that the proceeds of said bonds shall be used for the purpose of aiding in the construction of such railroad.

A canal company has like power to borrow and to execute bonds secured by mortgage on lands, privileges, franchises, and appurtenances of the company. The bonds constitute a lien on the

[1] Gen. Stat. 1867, ch. 133, § 6.
[2] Ibid. ch. 144, § 3.
[3] Ibid. ch. 144, § 4.
[4] Gen. Stat. ch. 145, § 2.
[5] Laws 1873, ch. 413, § 20; 2 Rev. 1877, p. 931, § 108.

canal, its real estate, and franchises, and the proceeds of such bonds must be used for the purposes of building or repairing the canal and its works.[1]

55. New Mexico Territory.[2] — Any railroad corporation has the power to borrow, on the credit of the corporation, and under such regulations and restrictions as its directors by unanimous concurrence may impose, such sums of money as may be necessary for constructing and equipping its railroad and telegraph lines, and to issue and dispose of its bonds or promissory notes therefor, in denominations of not less than five hundred dollars, and at a rate of interest not exceeding ten per cent. per annum ; and also to issue its bonds or promissory notes of the same denomination and rate of interest, in payment of any debts or contracts for constructing, equipping, and completing its railroad and telegraph lines, and all else relating thereto. The amount of bonds or promissory notes issued for such purposes shall not exceed in all the amount of its capital stock ; and to secure the payment of such bonds and notes, it may mortgage its corporate property and franchises.

56. New York.[3] — A railroad corporation may from time to time borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and may issue and dispose of its bonds for any amount so borrowed, and mortgage its corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid ; and the directors of the company may confer on any holder of any bond issued, for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

A corporation for manufacturing, mining, mechanical, or chemical purposes, is empowered to secure the payment of any debt contracted in the business for which it was incorporated, by mortgaging all or any part of its goods and chattels, and also its franchises, privileges, and rights, provided the written assent of a

[1] Laws 1877, ch. 85, § 14 ; 2 Rev. 1877, p. 940, § 142.

[2] Acts 1878, p. 35, § 14.

[3] Rev. Stat. 1875, p. 533, § 39, pl. 10; Same in General R. R. Act 1850; Laws 1850, ch. 140, § 28, pl. 10.

majority of the stockholders, owning at least two thirds of the capital stock of such corporation, shall first be filed in the office of the clerk of the county where it has its principal place of business, and also in the office of the clerk of the county where such goods and chattels are situated.[1]

Any railroad company is authorized to borrow money on the security of its railroad, appurtenances, and franchises, subject, however, to all previous incumbrances and debts in favor of the state and of individuals, to such an amount as may be sufficient for the purpose of putting so much of its railroad as such directors shall deem expedient in a proper condition to receive a second track; of procuring iron for such track, and of laying the same with an iron rail weighing not less than fifty-six pounds to the lineal yard; but such money shall not be used for, or applied to, any other purpose, nor shall the money borrowed by virtue of this provision exceed in the aggregate the sum of ten thousand dollars for each mile of the railroad of such company.[2]

57. North Carolina.[3] — A railroad corporation has power from time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid the right to convert the principal due or owing thereon into stock of said company at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

58. Ohio.[4] — A railroad company has power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest not exceeding seven per cent. per annum, and to execute bonds or promissory notes therefor, in sums of not less than one hundred dollars; and, to secure the payment

[1] Laws 1878, ch. 163.

[2] R. S. 1875, p. 550, § 90. For original statute see Laws 1847, ch. 405.

[3] Revisal 1873, p. 740, ch. 99, § 29, pl. 10.

[4] 1 R. S. 1860, ch. 29, § 31. As to bonds and mortgages of narrrow gauge railroad companies, see Laws 1877, p. 146.

thereof, such company may pledge its property and income. The bonds issued may be either registered or coupon bonds, or both; and either kind may be exchanged by the company for the other.[1]

59. Oregon. — No general provisions in relation to railroad mortgages are found.

60. Pennsylvania.[2] — The president and directors of a railroad company may borrow money, not exceeding the amount of capital stock subscribed, and issue the bonds of the company therefor, in such amounts as shall not exceed double the amount actually paid up of the capital stock subscribed, the proceeds whereof shall be actually expended in the construction and equipment of the road; these bonds may be made payable at such time, not exceeding fifty years after the date thereof, and at such place, and at such rate of interest, not exceeding seven per centum, as the directors may deem best; and they may secure the payment of such bonds and interest by a mortgage on the road and franchises.[3]

A mortgage to secure the bonds and obligations of a railroad company may be made upon the whole or any part of its property, rights, and franchises, subject to any prior incumbrances thereon. Special power is given to mortgage any branch, lateral, or diverging line.[4]

A narrow gauge railroad company,[5] whose line does not exceed fifty miles in length, and having a capital stock not exceeding $500,000, is authorized to borrow money not exceeding the capital stock in amount, and to issue bonds not exceeding double the amount of capital stock actually paid up, payable at a time not exceeding fifty years from date thereof, with interest not exceeding seven per cent. per annum, the proceeds to be expended in the construction and equipment of the road, and to secure the payment of such bonds and interest by a mortgage on the road and franchises, subject to any prior incumbrance thereon.

The Constitution of the state provides that no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and that all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of cor-

[1] Laws 1876, p. 123.

[2] Brightley's Purdon's Dig. pp. 12, 13, § 8; Act of April 4, 1868, § 8.

[3] Laws 1873, p. 45, § 21.

[4] Dig. *supra*, p. 1232, § 102.

[5] Laws 1876, p. 135.

porations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock be first obtained, at a meeting to be held after sixty days' notice given in pursuance of law.[1]

Any railroad company[2] of this state may from time to time purchase and hold or guarantee the bonds of any other railroad company chartered under the laws of this state, or existing under the laws of any other state. Any railroad or canal company may aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of this commonwealth, not possessing mining or manufacturing privileges in the county of Schuylkill, by the purchase of their bonds or by guaranteeing them.

Railroad companies may indorse or guarantee the bonds or other obligations of any other railroad company.

61. South Carolina. — There is no general act for the incorporation of railroad companies. Their powers are conferred and defined by special charters.

62. Tennessee.[3] — Any railroad company may issue bonds, for the purposes of its incorporation, to an amount not exceeding double the cost of that part of the road already completed, in such form, and for such sums not less than one hundred dollars, bearing interest at the rate of six per cent., and payable at such times and places as it may designate; and may pledge or mortgage the property, effects, and franchises of the company for the payment of the interest and final redemption of such bonds.

Any railroad company in this state owing outstanding floating debts, and being desirous of making provision for the payment of the same, is authorized to issue income bonds for an amount sufficient to pay off the indebtedness, bearing interest at a rate not exceeding ten per cent. per annum, payable either annually or semi-annually; and to secure such bonds by mortgage or deed of trust of either the whole or any part of the rents and profits, and other property and franchises of the company; such bonds, together with any consolidated bonds the company may

[1] Const. 1873, art. xvi. § 7.

[2] Brightley's Purdon's Dig. p. 1233, §§ 105, 106.

[3] Code 1858, p. 315, § 1443; Compiled Stat. 1871, § 1443. For act authorizing, in certain cases, consolidated mortgage bonds, see Acts 1873, ch. 8, § 1.

have issued, not to exceed twenty thousand dollars per mile of road, and not to affect existing liens.[1]

63. Texas.[2] — Any railroad corporation may from time to time borrow such sums of money as may be necessary for completing, finishing, improving, or operating its railway, and may issue and dispose of its bonds for any amount so borrowed, and mortgage its corporate property and franchise to secure the payment of any debt contracted by such corporation for the purposes aforesaid; but the concurrence of the holders of two thirds in amount of the stock of such corporation, to be expressed in the manner and under all the conditions provided for by another section of the statute, shall be necessary to the validity of any such mortgage; and the order or resolution for such mortgage must be recorded in a manner particularly provided; and the directors are empowered, in pursuance of any such order or resolution, to confer on any holder of any bond, for money so borrowed as aforesaid, the right to convert the principal due or owing thereon into the stock of such corporation at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation.

The Constitution of the state provides that no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and that all fictitious increase of stock or indebtedness shall be void.[3]

64. Vermont.[4] — Every railroad corporation within this state, if it shall vote so to do at a meeting of the stockholders called for such purpose, has power to issue its notes or bonds for the purpose of building or furnishing its roads, or paying any debts contracted for building or furnishing the same, bearing such a rate of interest, not exceeding seven per cent., and secured in such a manner as it may deem expedient. All bonds or notes which have been or which hereafter may be issued by any such corporation, for the purposes aforesaid, shall be binding and collectible in law, notwithstanding such notes or bonds were negotiated and sold by such corporation at less than par.

[1] Act 1873, ch. 8, §§ 3, 4.
[2] Laws 1876, ch. 97, § 23.
[3] Const. 1876, art. xii. § 6.
[4] Gen. Stat. 1870, ch. 28, §§ 97, 98, 99.

All notes or bonds which may be issued under and by virtue of these provisions must be issued for a sum not less than one hundred dollars each, and must be made payable in not less than three years, nor more than twenty years, from the time of issuing the same.

65. Virginia.[1] — No railroad company, which by its charter has no express power so to do, shall borrow money until there shall be paid up and expended or appropriated the whole amount of capital stock subscribed, with the exception only of losses by delinquent or insolvent stockholders. But the president and directors may borrow an amount not exceeding that part of the capital stock which is unsubscribed, and may issue certificates for the money so borrowed, and may make such certificates convertible, within a prescribed time, into stock of the company, at the pleasure of the holder.

66. West Virginia.[2] — Any railroad company is empowered, from time to time, to borrow such sums of money as may be necessary for completing, finishing, improving, or operating any such railroad, and to issue bonds, bills of credit or indebtedness, and preferred stock, and dispose of the same, for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted by such corporation for such purposes; but the concurrence of the holders of two thirds in amount of the stock of such corporation, to be expressed in the manner and under all the conditions provided for by statute, is made necessary to the validity of any such mortgage; and the order or resolution for such mortgage must be recorded as provided for; and the directors of such corporation are empowered, in pursuance of any such order or resolution, to confer on any holder of any bond, for money so borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of such corporation, at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation.

No corporation shall issue any stock or bonds, except for money,

[1] Code 1873, c. 61, § 43; Act 1836–37, p. 111, § 29. As to restrictions on corporations in which the state is a stockholder, see Code, *supra*, c. 57, §§ 41–43.

[2] Acts 1872–73, ch. 88, §§ 20, 22.

labor, property, and materials actually purchased, received, and applied to the purposes for which such corporation was organized. All stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void.

A railroad or other corporation authorized to issue its bonds may issue either registered or coupon bonds, and may exchange the one for the other; and the bonds given in exchange are entitled to the security or lien arising from any mortgage given for the security of the original bonds.[1]

67. Wisconsin.[2] — A railroad corporation has power to borrow such sum or sums of money at such rates of interest and upon such terms as said company or its board of directors shall authorize and agree upon, and may deem necessary or expedient, and to execute one or more trust deeds or mortgages, or both, as occasion may require, on any railroad or railroads constructed or in process of construction by said company, for the amount or amounts borrowed or owing by such company, upon such terms and in such manner as such company or its board of directors shall deem expedient; and such company may make such provisions in such deed or mortgage for pledging or transferring their railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, machine houses, rolling stock, furniture, tools, implements, appendages and appurtenances used in connection with such railroad or railroads, in any manner whatever, then belonging to said company, or which shall thereafter belong to it, as security for any bonds, debts, or sums of money that may be secured by such trust deed or mortgage, as they shall think proper.

[1] Acts 1877, ch. 3.

[2] Laws 1877, ch. 144, § 1.

CHAPTER II.

FORM AND CONSTRUCTION OF CORPORATE MORTGAGES.

I. Common kinds of corporate mortgages, 68–72.
II. Equitable mortgages, 73–77.
III. Statutory liens and mortgages, 78–83.
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I. *Common Kinds of Corporate Mortgages.*

68. Mortgages of railroad companies and other corporations are almost invariably in the form of trust deeds, with a power of sale. The intervention of trustees to take and hold the mortgage title for the benefit of the creditors secured, and to represent them in all important matters connected with the security, and especially in the enforcement of it, is almost, if not altogether, a necessity of corporate mortgages of the magnitude common with these securities. The holders of the bonds secured by such mortgages are often very numerous, and scattered all over the world. The bonds are made negotiable, so that they may be conveniently disposed of in the market, and consequently the bondholders do not remain the same from year to year, but are constantly shifting.[1]

Through the intervention of trustees the mortgage is in effect a contract between the corporation making it and all persons who may become holders of the bonds secured by it, and they are entitled to the same benefit they would have if made parties to the deed.[2]

It is usual in corporate mortgages to convey the property in trust to two or more trustees jointly, so that upon the death of a trustee his interest does not descend to his heirs, but vests in the survivor. This right of survivorship is not affected by statutes abolishing joint-tenancies and converting them into tenancies in

[1] See 2 Jones on Mortgages, §§ 1764–1771.

[2] Butler *v.* Rahm, 46 Md. 541.

common, unless the language of the statutes expressly embrace trust estates; for the evil to be remedied by such statutes is the improper accretion to the survivor of that which belonged in part to the deceased; and inasmuch as trust property, whether held by one or more persons, would only be held for the benefit of the *cestuis que trust*, whose estate would be in no manner affected by the death of one of the trustees, the reason of the law ceases, and the law itself does not apply.[1]

69. Although railroad mortgages generally contain a power of sale which the trustees may exercise upon default, it is not often that this power is resorted to for the enforcement of these securities. The property of such corporations is generally widely scattered, and in the hands of a great number of persons; and generally, too, there are conflicting interests arising from mortgages and other liens in favor of other persons. These considerations are generally sufficient to render it desirable and proper for mortgagees to resort to proceedings in equity to foreclose such mortgages rather than to exercise the summary rights conferred by powers of sale.

70. Indefiniteness in a power of sale will render it void. Thus the York and Cumberland Railroad Company[2] executed a mortgage, in the condition of which it was provided that upon failure of payment for the term of sixty days the holder of the bonds secured, or of any one or more thereof, was authorized to take possession for the common benefit and use of the holders of all the bonds, "and such holders shall share and share alike in the disposition and sale of the same for that purpose by public vendue, on reasonable notice given thereof to the grantors aforesaid, first deducting from such proceeds all costs and expenses incident to such possession and sale." A power of sale is not given in terms by the mortgage, nor is it necessarily implied from it. Moreover, if a power were assumed to exist, it would be void from the indefiniteness of the persons upon whom it is conferred, and from the impossibility of its execution. It is given to no one specifically. If one may sell so may another. If one wished to sell, and the others objected to a sale, the exercise of the power could not

[1] McAllister *v.* Plant, 54 Miss. 106.

[2] Mason *v.* York & Cumberland R. R. Co. 52 Me. 82.

be prevented. The bondholders, moreover, might severally proceed to sell; but if the sales should be made at the same time, at different places, and upon different terms and conditions, who, of the bondholders thus selling, will confer a valid title upon the purchaser? No estate is conferred upon the bondholders as such. This is conferred upon the mortgagee; but the power of sale, if conferred upon any one, is not conferred upon him. The mortgagee having attempted to exercise the power of sale, and having transferred to the purchaser all his right, title, and interest in the mortgage, it was held that the purchaser took an assignment of the mortgage and held the mortgage title in the same manner that the mortgagee had held it.

71. When bonds are secured by a conveyance strictly in the form of a mortgage rather than a trust deed, the mortgagee, after a transfer of any of the bonds, holds the legal title as mortgagee for his remaining interest and in trust for the holders of the bonds transferred.[1]

72. Debentures, which are the commonest form of security issued by English corporations, are defined to be instruments under seal, creating a charge, according to their wording, upon the property of the corporation, and to that extent conferring a priority over subsequent creditors, and over existing creditors not possessed of such a charge.[2] This is the true and proper use of the term; although it is frequently applied on the one hand to instruments which do not confer a charge, and which are nothing more nor less than ordinary unsecured bonds, and on the other, to instruments which are more than a mere charge, being in effect mortgages, and are properly termed mortgage debentures. Debentures, strictly so called, differ from mortgages in not conferring upon the grantees the legal title, or any of the ordinary rights of ownership of the property upon which a charge is created.[3] They are at most only equitable mortgages. The charge they create upon the property of the company confers only equitable rights, either as against other creditors, or as against the corporation; and in fact the true test whether an instrument is a

[1] 1 Jones on Mortgages, § 817; Mason *v.* York & Cumberland R. R. Co. 52 Me. 82; York & Cumberland R. R. Co. *in re*, 50 Me. 552.

[2] Brice on Ultra Vires, 2d ed. 279.

[3] To assist in understanding the English decisions, the forms of these instruments are given at the end of this section.

debenture or mortgage is found in the inquiry whether the holder has any legal right to interfere with the company's use or control of the property in whatever way it pleases. If the instrument confers a charge which can be protected and enforced only in equity, it is strictly a debenture.[1] Of course the effect and extent of the charge depends entirely upon the language used.[2]

Such debentures are in effect statutory mortgages. It will be noticed that the English railway mortgages differ widely from those in use in America, in that each creditor is there secured by a separate mortgage, while here one mortgage is made to secure all the mortgage creditors.

Under the Companies Clauses Act,[3] holders of mortgage debentures of a corporation have no priority as respects each other, but are all upon an equality. One mortgage debenture holder is not entitled to acquire an advantage over the other mortgage debenture holders. After a bill in equity against the company has been filed by all the debenture holders, and a receiver appointed, a single mortgagee, who has recovered judgment on his debenture, is not entitled to sue out an execution otherwise than as trustee for himself and the other mortgage debenture holders.[4]

[1] See Holroyd *v.* Marshall, 10 H. L. C. 191.

[2] General South American Co. *in re*, L. R. 2 Ch. D. 337.

[3] 8 Vict. 16, § 42.

[4] Bowen *v.* Brecon Ry. Co. L. R. 3 Eq. 541.

The form of a mortgage deed in England is prescribed by statute to be as follows, or to like effect (Companies Clauses Act 1845, 8 Vict. ch. 16, § 14.): —

"The Company."

Mortgage, number . £ .

By virtue of [*here name the special act*], we, "The Company," in consideration of the sum of pounds paid to us by A. B., of , do assign unto the said A. B., his executors, administrators, and assigns, the said undertaking, and all the tolls and sums of money arising by virtue of the said act, and all the estate, right, title, and interest of the company in the same, to hold unto the said A. B., his executors, administrators, and assigns, until the said sum of pounds, together with interest for the same, at the rate of for every one hundred pounds by the year, be satisfied ["the principal sum to be repaid at the end of years from the date hereof," *in case any period be agreed upon for that purpose* "at ," *or any place of payment other than the principal office of the company*]. Given under our common seal, this day of , in the year of our Lord .

The same act prescribes the following form of bond: —

"The Company."

Bond, number . £ .

By virtue of [*here name the special act*], we, "The Company," in consideration of the sum of pounds to us in hand paid by A. B., of do bind ourselves and our successors unto the said A. B., his executors, administrators, and assigns, in the penal sum of pounds.

II. *Equitable Mortgages.*

73. An instrument which was intended to be the mortgage deed of a corporation, but which, not being executed by the corporation, or in its name, cannot take effect as its deed, may nevertheless be regarded as an equitable mortgage, and entitle the holders of it in equity to the full benefit of the security intended to be given. The Rutland and Washington Railroad Company authorized its president to issue bonds secured by a mortgage of its road and franchise. The president executed an instrument which recited his authority, proceeded in his name as president to convey the property in mortgage, and to make the covenants, and the deed was signed in his own name. The company issued bonds under this mortgage, and did various acts in ratification of the security, and afterwards issued two other sets of bonds, and secured them by second and third mortgages executed in due form. The first bonds not being paid when due, the trustees filed a bill to foreclose the mortgage, whereupon the subsequent mortgagees claimed that the first mortgage, by reason of its defective execution, did not constitute a lien upon the property. The court, however, sustained it as an equitable mortgage. As against the corporation itself, the bonds and mortgage were binding

The condition of the above obligation is such, that if the said company shall pay to the said A. B., his executors, administrators, or assigns ["at ," *in case any other place of payment than the principal office of the company be intended*], on the day of , which will be in the year one thousand eight hundred and , the principal sum of pounds, together with interest for the same, at the rate of pounds per centum per annum, payable half-yearly, on the day of , and day of , then the above written obligation is to become void, otherwise to remain in full force. Given under our common seal, this day of , one thousand eight hundred and .

Form of transfer of mortgage or bond: —

I, A. B., of , in consideration of the sum of , paid to me by G. H., of , do hereby transfer to the said G. H, his executors, administrators, and assigns, a certain bond [or "mortgage"], number , made by "The Company" to , bearing date the day of , for securing the sum of and interest [*or, if such transfer be by indorsement,* "the within security"], and all my right, estate, and interest in and to the money thereby secured [*and if the transfer be of a mortgage,* "and in and to the tolls, money, and property thereby secured"]. In witness whereof, I have hereunto set my hand and seal, this day of , one thousand eight hundred and .

[1] Miller *v.* Rutland & Washington R. R. Co. 36 Vt. 452.

contracts. Objection was made that the mortgage was not a memorandum in writing sufficient to satisfy the statute of frauds. The vote of the directors in connection with the deed was regarded as sufficient in this respect, and as furnishing an equitable right in the security contracted to be given. It was also objected that a court of equity would not give relief for mistake in matter of law; but there was no occasion to discuss this question, because there was no mistake on the part of the corporation as to matter of law; for the intention was that the president should make a valid technical mortgage, and it was altogether a mistake on his part that it was not technically the deed of the corporation. He by mistake made one that technically could operate only as his own deed.

But after determining that the instrument constituted an equitable mortgage between the parties, it remained to establish it as such against the subsequent mortgagees. The court was convinced by the evidence, that all the trustees under the second and third mortgages, prior to and at the time such mortgages were executed, had notice and knowledge, in point of fact that the first bonds had been issued, and that they were secured by mortgage. They stood chargeable, therefore, with the legitimate effect of the right, whether legal or equitable, which existed in virtue of the issuing of the bonds with such security by way of mortgage as appertained to them. The trustees under these mortgages were the agents of the holders of the bonds, and notice to the agent was notice to the bondholders, who therefore took their bonds subject to all the legal consequences of the existence of the equitable first mortgage. Notice to the trustees should be held to affect the title in their hands, with reference to all rights existing in respect thereto under the trust. "Though it be obvious and readily conceded," said Mr. Justice Barrett, "that bondholders acquire their rights, in reference to the security provided by the mortgage in trust, by the purchase of the bonds, and with such purchase the trustees have no connection, nor any agency in reference to the transfer thereof, yet, it is at the same time true, that, in reference to the security for holding, enforcing, and administering it according to the provisions of the trust, the trustees are the agents of the parties interested and entitled by reason of being bondholders. We are unable to assent to the proposition, that the trustees are only agents of the *cestuis*

que trust for holding the legal title. They are agents for holding just such title as is created by the transaction, and for administering it according to the terms of the trust, and whatever title the *cestuis que trust* have, whether legal or equitable, is through, and in virtue of, the title conveyed to and held by the trustees. Even if it should be granted that the trustees were agents merely for holding the legal title, still, as the rights of the *cestuis que trust* depend upon and are to be asserted through that legal title, whatever affects such legal title in its creation in the trustees must affect the rights and interests that are dependent upon it. If the legal title is charged with an incumbrance in its creation in the hands of the trustees, it is difficult to see how the *cestuis que trust* can have an equity suspended upon that legal title that shall override such incumbrance. However that might be as a proposition applicable to a dry trust, still, as to a trust which, in addition to the holding of the title, is administrative of the property for the purposes of effectuating the security, the trustees must be regarded as the agents of the *cestuis que trust* with reference to their rights and interests, both in the title held and in the administration and fruits of the trusts, according to its terms and legal operation."

74. A contract to give a mortgage for specified sums has in equity the effect of a mortgage to the extent indicated. But such a contract implies that no other or different mortgage or lien is to be given; and a stipulation for a mortgage "for the advancements made or money expended" under a contract cannot be made to include damages for a breach of the contract.[1] If the property to be charged consists of land, it is of course ineffectual by reason of the statute of frauds, unless it be in writing; but an agreement by word of mouth to charge other property may be enforced in equity by a decree for specific performance.[2]

Statutory liens, as affecting personal property, have, without possession, the same operation and efficacy that existed in common law liens, when the possession was delivered.[3]

75. Without a formal mortgage the bonds of a corpora-

[1] Waco Tap R. R. Co. *v.* Shirley, 45 Tex. 355; 13 Am. Railw. Rep. 233; and see 1 Jones on Mortgages, § 163

[2] Ashton *v.* Corrigan, L. R. 13 Eq. 76; Peto *v.* Brighton, &c. Ry. Co. 1 H. & M. 468.

[3] Beall *v.* White, 94 U. S. 382.

tion providing that they shall be a lien upon the property of the company prior to all others, are in substance a mortgage, and may be enforced in equity as against the corporation and its property. Of course as against subsequent purchasers and incumbrancers without notice of such lien, whose deeds are first recorded, such bonds would have no priority. Such for instance were the bonds of the White Water Valley Company, a corporation organized under the laws of the State of Indiana to build a canal, and whose bonds, pledging "the effects, real and personal," of the company, contained recitals that they should have preference over all debts to be thereafter contracted, and that in default of the payment of interest, the holder of the bonds might enter into possession of the tolls, water-rates, and other incomes of the company, and might apply for the appointment of a receiver. Upon a default occurring, the Supreme Court of the United States held that the bondholders were entitled to this relief, the bonds in effect constituting a mortgage.[1]

Similar illustrations, that informal agreements or instruments are sufficient in equity to create a charge, are furnished by the English courts. Thus, the directors of the Strand Music Hall Company borrowed money under a written agreement that they would deposit with the lender, as collateral security, certain incomplete mortgage bonds, constituting a first charge upon the property. In the winding up of the company, a question arose whether these mortgage bonds, by reason of their incompleteness, constituted a valid charge upon the property for this loan. Turner, L. J., delivering the opinion of the court that a valid charge was created, said:[2] "I apprehend that where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

A mortgage not executed and recorded according to law, nevertheless has priority of a subsequent mortgage which is expressly made subject to the former.[3]

76. An agreement of a company to set apart specific

[1] White Water Valley Canal Co. *v.* Vallette, 21 How. 414. See § 72.

[2] Strand Music Hall Co. *in re*, 3 De G., J. & S. 147, 158.

[3] Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372.

earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge. The legal proposition, which is an accepted doctrine of courts of equity, is tersely stated by Judge Dillon :[1] " If a debtor, by a concluded agreement with a creditor, sets apart a specified amount of a specific fund in the hands, or to come into the hands of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties and upon all persons with notice, who subsequently claim an interest in the fund under the debtor."

77. An equitable mortgage must have some foundation in contract, or must arise by necessary implication from the terms or scope of a contract. A provision in a railroad mortgage to trustees made for the purpose of retiring an existing mortgage and prior liens, and of completing and equipping a railroad, that the expenditure of all sums realized from the sale of the bonds secured shall be made with the approval of at least one of the trustees, whose assent in writing shall be necessary to all contracts made by the corporation, before the same shall be a charge upon any of the sums received from said sales, does not create a charge in favor of one who has afterwards built a portion of the road under a written contract with the corporation, if the contract did not itself impose such charge. To create a charge upon money which has no ear-mark would require evidence of the most unmistakable language. It is not enough to create such a charge that the party claiming the lien may, through his efforts or outlays, have added to the security of the bondholders.[2]

III. *Statutory Liens and Mortgages.*

78. A mortgage may be constituted by statute without the execution of any deed of conveyance.[3] In this way the Union Pacific Railroad was mortgaged to the United States to secure the repayment of the amount of bonds of the United States issued and delivered to the company to aid in the construction of the road; the act of Congress authorizing such aid [4] providing that

[1] Ketchum *v.* Pacific Railroad, 4 Dill. 78, 86. See § 122.

[2] Dillon *v.* Barnard, 1 Holmes, 386.

[3] Wilson *v.* Boyce, 92 U. S. 320; *S. C.* 2 Dill. 539; Murdock *v.* Woodson, 2 Dill. 188 Woodson *v.* Murdock, 22 Wall. 351.

[4] Act of July 1, 1862, 12 Stat. at Large,

"the issue of such bonds and delivery of them to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description; and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required to do so by the secretary of the treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereto belonging, and also all lands granted to the said company by the United States which at the time of said default shall remain in the ownership of said company, may be taken possession of by the secretary of the treasury for the use and benefit of the United States."

When a statute clearly provides for a lien, it is not essential that the bonds issued by the corporation should themselves recite the words of the act creating the charge, if they show by reference to the act that they were intended to carry the benefit of the lien. An act authorizing a canal company to borrow money on its bonds provided that these should "take precedence and have priority of lien on the said canal and the tolls thereon and other property of the said company over all claims." The bonds issued for the money borrowed by the company stated that the holder was "entitled to such security therefor as is mentioned in the said recited act." The court held that the holders were entitled to a charge upon the canal and tolls as provided by the act, and to the appointment of a receiver.[1]

79. A statutory lien can exist only when the statute in terms not doubtful expresses the intention to give a lien. Thus under a statute giving a city authority to aid a railroad company, and to receive security from the company by mortgage or pledge of stock, the city having accepted security of the latter kind, it can have no statutory lien by reason of a clause of the statute which declares that the above liens, mortgages, or other securities, shall have priority of all claims or obligations subsequently contracted by the company.[2]

489; and see United States *v.* Union Pacific R. R. Co. 91 U. S. 72.

[1] Town of Dundas *v.* Desjardins Canal Co. 17 Grant (Upper Can. Ch.), 27.

[2] Cincinnati City *v.* Morgan, 3 Wall. 275.

To constitute a statutory lien, it must clearly appear that it was intended that the statute should have this effect. The Brunswick and Florida Railroad, in 1856, issued its bonds without securing them by mortgage, and subsequently issued other bonds with such security. The holder of the first bonds claimed that under the charter of the company these bonds, *ipso facto*, became a lien upon the property of the company, which was unaffected by the subsequent mortgage. The charter upon which this claim was based provided, that "it should be lawful for the board of directors to direct the president and secretary to issue bonds of said company, which shall be binding on the property of said company, and on such other property belonging to the stockholders as they may pledge to said company, by mortgage, to meet their own engagements or the engagements of the company." The court, however, held that these words did not give a statutory lien upon the company's property, which was superior or equal to the lien of the subsequent mortgage.[1] The case of *Collins* v. *Central Bank of Georgia*[2] was discussed and considered at length in this connection. The Monroe Railroad and Banking Company was authorized to do a banking business and to issue bills for circulation, and the act provided that the "railroad to be built by said company, together with all the revenues arising therefrom, and all the property, equipments, and effects therewith connected, should be pledged and bound for the redemption of the same." The company having suspended payment, and being unable to complete its road, arranged with contractors to do this under a written agreement that they should have a lien upon the entire road. Upon a subsequent sale of the road under a creditor's bill, the court held, with reference to the distribution of the proceeds, that under the charter the bill holders had a lien in preference to the contractors as to all that portion of the road built by the company prior to the agreement with the contractors, and that the latter had a prior lien only upon the part they built. This case is distinguished from the case above noticed chiefly by the different nature and character of the debts in the two cases; the one being an ordinary debt for a loan of money and the other a debt to bill holders issued under authority of the state for circulation among the people, and having, upon grounds of public policy, a claim to protection. Besides, the lan-

[1] Brunswick & Albany R. R. Co. *v.* Hughes, 52 Ga. 557.

[2] 1 Kely (Ga.), 435.

guage regarding the lien was considered stronger in the case of the banking company than in the case of the railroad; and in the latter case it was regarded as only a fair construction of the whole provision, that, while certain property of the stockholders mortgaged to the company was to be capable of being charged with this debt, it was not intended to discharge the company itself and its property. In other words, the intent to create a lien upon the company's property was not manifested with certainty enough to establish it.

80. A statutory mortgage is construed in the same manner as one executed by deed, as regards the property it embraces. Thus, the State of Missouri having issued bonds in aid of the Cairo and Fulton Railroad Company, under an act which declared that they should "constitute a first lien and mortgage upon the road and property" of the company, it was held by the Supreme Court of the United States that a valid lien was created by the act upon all the lands of the company, including such as did not constitute the road, or any part of it, and were not used in connection with it.[1] The generality of the language is no objection to the validity of the mortgage. It is, moreover, as competent for a railroad company to mortgage the lands it has received from the state in aid of its construction as it is to mortgage the lands used for its track or appurtenant to it. The word "property" is broad enough to cover the outside lands of the company, and the legislature must be regarded as having intended, in using this word, to cover all the corporate property of the company of every nature and wherever situated; and such was the construction given to this language by the Supreme Court of Missouri.[2]

81. A statutory mortgage by a railroad company, like a mortgage created by deed, may embrace after-acquired land and other property acquired after the creation of the lien, if the intention to embrace such land be manifest in the act creating the lien.[3] A statutory mortgage in favor of the State of Missouri, making all bonds issued by the state in aid of certain railroad companies a first lien upon the road and property of the several

[1] Wilson *v.* Boyce, 92 U. S. 320, affirming *S. C.* 2 Dill. 539.

[2] Whitehead *v.* Vineyard, 50 Mo. 30.

[3] Whitehead *v.* Vineyard, *supra*.

companies securing them, was held to embrace after-acquired lands, although outside the railroad and not necessary to its use. The term "road and property" is broad enough to cover by the lien of the state all the corporate property of the companies named in the act, and clearly shows an intention to cover all their property.[1] A subsequent foreclosure and sale of the road and its property under such act carries the title to such land, although the company has in the mean time conveyed it to a purchaser. A purchaser from the company subsequent to the mortgage can acquire a clear title only through a release of the lien, or by virtue of a statute authorizing sales by the company discharged of the lien in favor of the state.

82. Release of statutory lien. — In 1868 the State of Missouri, holding a statutory lien upon the Pacific Railroad of Missouri, as indemnity for bonds issued in aid of that company to the aggregate of $7,000,000, passed an act by which, in consideration of $5,000,000, the state would release and discharge the lien. This amount was paid to the state by the railroad company, and the release was made; and on the faith of this release the company mortgaged its road and sold its bonds with the intention of giving a first mortgage lien. The state had previously provided in its Constitution that in the event of any default in the payment of bonds issued by the state in aid of railroad companies, the general assembly should provide by law for the sale of the road and franchises of the company thus making default, under the lien reserved to the state; but that the general assembly should have no power, for any purpose whatever, to release the lien held by the state upon any railroad. In 1873 the legislature of the state directed the governor and attorney general of the state to foreclose the mortgage which had been released, upon the ground that the release was illegal. The trustees of the mortgage subsequently made applied to the Circuit Court of the United States for an injunction restraining this sale, and thus the constitutionality of the act of the legislature authorizing the release of the lien in favor of the state was called in question. Judge Dillon, in granting the injunction, upon this question said :[2] "Looking back

[1] Whitehead *v* Vineyard, *supra.*

[2] Murdock *v.* Woodson, 2 Dill. 188; affirmed by the Supreme Court of the U. S. on appeal, Woodson *v.* Murdock 22 Wall. 351. See, also, Darby *v.* Wright, 3 Blatchf. 170.

upon the transaction, I cannot say that the agreement to release the security of the state for $5,000,000 should, under the circumstances, and as respects the innocent mortgagees of the company, be held to be such a release as was forbidden by the Constitution. The state had released or waived its first lien on the North Missouri Railroad, receiving no consideration therefor, and agreed to take a second lien. This was at or about the time the constitutional convention was in session, and undoubtedly it was such a transaction that was in the contemplation of the convention and the people when they adopted the provision prohibiting the state from releasing its lien on any railroad. It was not intended to prohibit the release of a lien for full value; and of such value the legislature was left to be the judge, and with its judgment the people of the state must be content. It is urged by counsel that this view makes the constitutional provisions of little value, since it leaves it in the power of the legislature to sacrifice the interests of the people by corrupt or injudicious bargains, and the court is appealed to, to prevent the sacrifice which, it is claimed, the Act of 1868 decreed. But we have only to deal with the question of legislative power; and the legislature, as the representative of the state as a mortgagee, and as the representative of her other interests, has full power except so far as restrained by the Constitution. If it had been thought that the legislature could not have been trusted with the sale or disposition of the state's interest as to the amount to be received, undoubtedly additional restraints would have been imposed. The state was not disabled from releasing its security on receiving full value for it, and of its value it was left by the Constitution to be the judge, — so left because there was nothing to restrain it. I feel quite clear in the conviction that the equities of the bondholders under the plaintiff's mortgage are superior to those of the state, and on this ground, and on the ground that in case of controversy as to priority of lien, the priority ought to be settled before an irredeemable sale is made, I award a temporary injunction."

83. Not only may a statutory lien be waived, but another person may be substituted by agreement of parties in place of the original lien holder. This proposition is illustrated in another phase of the statutory lien last mentioned.[1] Prior to the release

[1] Ketchum *v.* Pacific Railroad, 4 Dill. 78.

by the State of Missouri of the lien in its favor, and the making of the mortgage referred to, the county of St. Louis, under legislative authority, had loaned its bonds to the railroad company to the amount of $700,000, to enable it to complete the road. The county was secured by a provision in the act authorizing the loan, that the person who had been in custody of the earnings of the road, in behalf of the state, should pay into the county treasury out of such earnings a sum sufficient to meet the interest on the bonds. The effect of this provision, when acted upon, was, that the state, then having a complete and perfect lien upon all the earnings of the road, waived it to this extent in favor of the county, and the county was *pro tanto* substituted in its place. This lien of the county was recognized in the subsequent legislation under which the state released its lien. The company having afterwards made a second and third mortgage, a foreclosure sale was made under the latter, the holders of which claimed that the county was not entitled to any charge or lien upon the proceeds. The court, however, established the lien, upon the ground that the effect of the act, and the acceptance of it by the county and the company, was to convert its provisions into a contract which created a lien, having its origin by statute, and equitable in its nature, and of which the subsequent mortgagees had notice through the statutes creating and recognizing it.

IV. *Who may execute a Corporate Mortgage.*

84. The directors of a railway corporation, in the absence of any restriction in its charter or by-laws, may exercise all the authority of the corporation itself in pledging its real or personal property to secure any debts which it is authorized to contract.[1] Being the agents of the corporation rather than the corporate body, they may exercise their powers beyond the state by whose laws the corporation was created; and therefore directors of a Vermont corporation may grant a valid mortgage at a meeting held in Massachusetts.[2]

When a corporation has by law the power to execute a mort-

[1] 1 Jones on Mortgages, §§ 124–128. Hendee *v.* Pinkerton, 14 Allen (Mass.). 381, per Foster, J.; McCurdy's Appeal, 65 Pa. St. 290. And see Bank of Middlebury *v.* Rutland & Washington R. R. Co. 30 Vt. 159, 169.

[2] Arms *v.* Conant, 36 Vt. 744; and see Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459; Ohio & Mississippi R. R. Co. *v.* McPherson, 35 Mo. 13; Wright *v.* Bundy, 11 Ind 398, 404; McCall *v.* Byram Mfg. Co. 6 Conn. 428.

gage of its franchises and property, a mortgage executed by authority of the directors alone is valid.[1] Any doubt of the validity of such a mortgage is removed by acts of the corporation in ratification of it, such as the issuing of bonds under it and the paying of interest upon it.[2]

It is a sufficient consideration for upholding a mortgage that it was made in conformity with a binding resolution of the board of directors to secure the payment of the company's bonds, so that they might be more advantageously disposed of in the market.[3]

85. **A power to an officer or agent of a corporation to borrow money on its behalf includes authority to pledge its bonds,** or to give other ordinary securities for the money borrowed. The Minnesota and Pacific Railroad Company authorized its president to borrow such sums, for such length of time and at such rate of interest, as he might think proper, and to purchase iron rails, locomotives, and machinery on such terms as he might deem advisable; and in order to do so, to make, execute, and deliver obligations, bills of exchange, contracts, and agreements of the company. The president accordingly made a contract in New York for a purchase of railroad iron, and an advance of $16,000 to the company on its notes, and for the security of this contract pledged $45,000 of bonds of the State of Minnesota belonging to the company. The Supreme Court of the United States held that he was clearly authorized to pledge the bonds. He was empowered to make actual purchases, and to borrow money, not merely to make executory contracts for future purchases and loans. To give collateral security for these undertakings was within the limits of such a power.[4]

The president of a railway corporation having authority by a by-law to act as business and financial agent of the corporation cannot bind it by a mortgage of personal property, even such as a locomotive, given to secure a debt of the corporation.[5] His authority in such case is confined to the ordinary business of the corporation. The fact that he affixes to the instrument the corporate seal adds nothing to the validity of the instrument. That

[1] McCurdy's Appeal, 65 Pa. St. 290.
[2] McCurdy's Appeal, *supra*.
[3] Butler *v.* Rahm, 46 Md. 541.
[4] Hatch *v.* Coddington, 95 U. S. 48.
[5] Luse *v.* Isthmus Transit Ry. Co. 6 Oregon, 125; Hoyt *v.* Thompson, 5 N. Y. 320, 335; Whitwell *v.* Warner, 20 Vt. 425; Despatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. H. 205.

does not make the instrument the deed of the company, unless it was affixed by authority. The seal bears upon its face the presumption that the instrument was executed by competent authority from the corporation; but this presumption may be repelled by showing that the seal was affixed without authority. In general, it may be said that when a transfer of corporate property requires the use of the common seal it cannot be made without the assent and authority of the board of directors.

86. **As regards the execution of a corporation mortgage, if the deed purports to be the deed of the corporation,** the fact that it is not signed by the corporate name, but by an officer having the power to execute the deed in behalf of the company, in his individual name, does not invalidate it as the deed of the corporation.[1] But if the deed purports to be the deed of the officer, and is signed by him in that manner, it is not the deed of the corporation.[2]

Where there is ambiguity on the face of a note signed by the president of a railroad company in his individual name, without addition, acknowledging indebtedness for labor performed on land of the company, parol evidence is admissible to ascertain whether the note be his own obligation or that of the company.[3]

87. **The mere fact that a mortgage deed has the seal of a corporation attached does not make it the deed of the corporation,** unless the seal was placed upon it by some one duly authorized. The seal being affixed to the deed, there is a presumption that it was rightfully affixed; but this presumption may be overthrown by parol evidence to the contrary. When it is shown that the officers who executed the mortgage did not seal it then or

[1] Haven *v.* Adams, 4 Allen (Mass.), 80. The mortgage in this case was executed in these words: "In testimony whereof, said party of the first part have caused these presents to be signed by their president, and their common seal to be hereto affixed. A. B., President," and seal. And see Despatch Line of Packets *v.* Bellamy Manf. Co. 12 N. H. 205. In Maine, see as to effect of statute in such case, Porter *v.* Androscoggin & Kennebec R. R. Co. 37 Me. 349. See 1 Jones on Mortgages, § 130.

[2] Brinley *v.* Mann, 2 Cush. (Mass.) 337. In this case the words were: "In witness whereof I (the treasurer), in behalf of said company, and as their treasurer, have hereunto set my hand and seal. A. B., Treasurer," &c., and seal. See, also, Miller *v.* Rutland & Washington R. R. Co. 36 Vt. 452.

[3] Richmond, Fredricksburg & Potomac R. R. Co. *v.* Snead, 19 Gratt. 354.

afterwards; that the officer who had the seal in custody never affixed it, nor authorized any one else to do so; and that the instrument was recorded without a seal, the burden is thrown upon the mortgagee to prove that it was properly sealed. Otherwise the conclusion will be drawn that the seal was fraudulently abstracted from the lawful custodian of it, and wrongfully affixed to the mortgage.[1]

88. Ratification. — The execution of a mortgage by the officers of a railroad company, without previous authority from the corporation, is ratified and confirmed by the payment of interest upon the bonds, and by other acts showing a clear recognition of the mortgage by the corporation.[2]

The receiving and retaining of money advanced by bondholders upon a railroad mortgage amounts to a ratification of the contract under which the money was obtained, and it does not matter that the resolution authorizing the giving of the mortgage did not give the president and secretary authority to make so extensive a mortgage as that which was in fact executed.[3] In like manner, if the president and secretary of a railway company execute a mortgage in broader terms than they were authorized by the resolution of the directors to make it, and money is advanced in good faith upon its bonds, and is received and used by the company in constructing its road, this will be deemed a ratification of the contract under which the money was advanced.[4]

Under a statute which provides that a majority of the stockholders at any legal meeting is requisite for the valid transaction of any business, except that the board of directors shall not be empowered to mortgage or hypothecate the property of the company, unless by a vote of two thirds in interest of the stockholders, while it is competent for a majority to ratify the execution of a promissory note of the company, it requires a two thirds vote to ratify the execution of a mortgage given to secure such note. Therefore, a subsequent resolution adopted by a majority of the stockholders, to levy an assessment for the express purpose of liquidating the note, would be a distinct recognition of it, and

[1] Koehler *v.* Black River Falls Iron Co. 2 Black, 715; and see Reed *v.* Bradley, 17 Ill. 321.

[2] McCurdy's Appeal, 65 Pa. St. 290.

[3] Elwell *v.* Grand St. & Newtown R. R. Co. 67 Barb. (N. Y.) 83.

[4] Elwell *v.* Grand St. & Newtown R. R. Co. *supra*.

equivalent to a previous authority to execute it. But the mortgage stands upon a different footing. It cannot be ratified by a less number of stockholders than was required for its execution. The assessment being valid, the stockholders had no option but to pay it, and their understanding that the money was to be applied to the payment of the note does not show that they admitted the validity of the mortgage.[1] The subsequent assent of two thirds of the number of stockholders by any instrument in writing which identifies the mortgage is sufficient. The requirement as to the number of stockholders necessary to authorize a mortgage has reference to the stock actually issued, and not to the nominal amount to which the capital stock is limited.

V. *Construction of Various Provisions of Corporate Mortgages.*

General statement. — Mortgages by railroad comapnies and other corporations differ so widely in their form and provisions, that it would be of little use to take up the several parts of a corporate mortgage and treat in detail of their construction in the way that the several parts of an ordinary mortgage might be treated of.[2] Without, therefore, attempting anything of this nature, and without attempting to make a systematic examination of the several provisions of railroad and other corporate mortgages, it is proposed in this division of the chapter to state the construction which the courts have placed upon various clauses peculiar to such mortgages.

89. **Restrictions or provisions in a statute authorizing a corporation to issue bonds secured by mortgage enter into the contract,** and bind the parties to it, although the mortgage itself contains inconsistent provisions. Thus, where a mortgage is made to secure bonds with interest payable semi-annually, under the authority of a statute which declares that the bonds shall not mature at an earlier period than thirty years, a provision in them that, upon a failure to pay any coupon when presented for payment, and a continued default thereon for six months, the whole sum mentioned in the bonds shall become due and payable, is void. In such case, however, the mortgage may properly provide

[1] Forbes *v.* San Rafael Turnpike Co. 50 Cal. 340; and see Greenpoint Sugar Co. *v.* King's County Manuf. Co. 7 Hun (N. Y.), 44.

[2] 1 Jones on Mortgages, §§ 60–101.

that it shall be foreclosed upon non-payment of interest. When a foreclosure suit is brought in consequence of such default, and the sum ascertained to be due on the coupons is paid within such reasonable time as the court shall appoint, — say ninety days or six months, or until the next term of court, — no further proceedings in the suit can be had until there is another default. If the sum be not so paid, a sale of the property, with a foreclosure of all the rights subordinate to the mortgage, should be ordered, with a direction to bring the proceeds into court. There can be but one decree of foreclosure of the same mortgage on the same property; and it is a necessity of that foreclosure, under the principles of equity, that all the sums secured by the mortgage shall be protected according to their priority of lien. The mortgagee will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of sale.[1]

When authority is given in general terms to an officer or agent of a corporation to execute a mortgage of its property, he has implied authority to execute it in the usual form, and with the usual provisions for mortgages of that kind; but there is no implied authority to execute a mortgage with unusual provisions. Thus, a stipulation that the principal sum secured should become due at the option of the holder, upon default in the payment of the interest, being unusual in mortgages executed in Wisconsin, the Supreme Court of that state held that under such general authority the agent could not bind the company by such a stipulation. The unauthorized stipulation would not, however, invalidate the mortgage in any other respect.[2]

90. The whole debt may be made to become due upon any default in the payment of interest or of principal. A provision in a railway mortgage made to trustees for the benefit of bondholders, that upon any default in the payment of any instalment of the principal or interest, the whole debt shall become due and payable, if not inserted in the bonds secured by the mortgage, may not affect their payment, or enable a bondholder to enforce them by suit at law as becoming due upon a default in the payment of interest. In such case the interest clause is not regarded as

[1] Howell *v.* Western R. R. Co. 94 U. S. 463.

[2] Jesup *v.* City Bank of Racine, 14 Wis. 331; 1 Jones on Mortgages, § 129.

having been placed in the mortgage to give the several bondholders a right of action upon it for the principal of the bonds, but to give the trustees, with whom the covenant was made, in trust for the bondholders, a right of action upon it, so that, through foreclosing the mortgage, it might be a more complete security to the bondholders with such a clause than it would be without it. Such was the conclusion in one case,[1] although upon each of the bonds was a certificate, signed by the trustees, which stated that the said series of bonds was secured by a first mortgage, which contained a provision, "that the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months." A bondholder having brought a suit upon some of the bonds before their maturity, it was held that he could recover only the interest remaining unpaid and represented by the coupons. Aside from the fact that this clause was not inserted in the bonds, reliance was placed by the court upon the fact that in the mortgage this clause was connected with other clauses, which had reference solely to the enforcing of the mortgage security, and immediately following were the words: "And the lien or incumbrance hereby created, for the security thereof, may be at once enforced." The inference was, that the interest clause had reference solely to the enforcement of the security by the trustees.

91. A mortgagee who does not choose to enforce his mortgage after a default in the payment of interest cannot be compelled to receive payment of the principal debt before its maturity, except in pursuance of some general law enacted previously to the making of the mortgage, and therefore entering into the substance of the mortgage contract. The State of New Jersey provided by statute[2] that whenever a railroad company of that state became insolvent, or failed for ninety days after the same became due, to pay the principal or interest on any mortgage upon the property and franchises of the company, upon the application of any creditor, mortgagee, or stockholder of the company, the chancellor might appoint a receiver, and authorize him to sell the property and franchises of the company free of all in-

[1] Mallory *v.* West Shore Hudson River R. R. Co. 35 N. Y. Superior Ct. 174. See 1 Jones on Mortgages, § 76.

[2] Laws 1870 (March 17), ch. 430.

cumbrances, and the money arising from such sale should be paid into court subject to the same liens, to be disposed of as the court might direct. Prior to this statute the New Jersey West Line Railroad Company executed a mortgage to trustees, to secure certain bonds, payable in the year 1900, one of the terms of the mortgage being, that if the principal or interest should not be paid at the time stated, the principal sum secured by the mortgage should become immediately due "at the election of the trustees." Upon the subsequent insolvency of the company, upon the application of creditors, a receiver was appointed, and he was authorized to sell the property free from the lien of the mortgage. The mortgagees resisted this order of sale, and the Court of Errors and Appeals [1] held that the trustees, not having exercised their election to regard the mortgage as due and payable, the property could not be sold free from this lien. The time fixed for payment of a mortgage loan is a material matter, and it cannot be hastened or postponed without altering the contract in point of substance. The mortgagee cannot be compelled by any legislative act subsequently framed to accept payment at an earlier period than the mortgage provides for.

92. The word "maturity," as applied to the time of payment of bonds bearing semi-annual interest, was a subject of interpretation in the case of *United States* v. *Union Pacific Railroad Company*,[2] where the question was whether the company was required to pay the interest on the bonds issued by the United States in aid of the company before the maturity of the principal of the bonds. The bonds were issued by the United States under an act of Congress,[3] giving a statutory mortgage upon the property of the company for the amount of bonds to be issued, and providing that upon a failure of said company to redeem the bonds in accordance with the terms of the act, the secretary of the treasury might take possession of the property for the use and benefit of the United States. The act further provided that "the grants aforesaid are made upon condition that said company shall pay said bonds at maturity; . . . . and all compensation for services rendered for the government shall be applied to the

[1] Randolph *v.* Middleton, 26 N. J. Eq. 543; *S. C.* Middleton *v.* N. J. West Line R. R. Co. 25 N. J. Eq. 306.

[2] 91 U. S. 72.

[3] Act of July 1, 1862; 12 Stats. at Large, p. 489.

payment of said bonds and interest until the whole amount is fully paid." By a subsequent act,[1] it was provided that "only one half of the compensation for services rendered for the government shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said road." The Supreme Court of the United States,[2] upon consideration of the act and the purposes contemplated by it, held that it was not the intention of Congress to require the company to pay the interest before the maturity of the principal of the bonds. Mr. Justice Davis, delivering the opinion of the court, said: "If the language used is taken in its natural and obvious sense, there can be no difficulty in arriving at the meaning of the condition 'to pay said bonds at maturity.' As commonly understood, the word 'maturity,' in its application to bonds and other similar instruments, refers to the time fixed for their payment, which is the termination of the period they have to run. The bonds in question were bonds of the United States, promising to pay to the holder of them one thousand dollars thirty years after date, and the interest every six months. This obligation the government was required to perform; and, as the bonds were issued and delivered to the corporation to be sold for the purpose of raising money to construct its road, it is insisted that Congress must have meant to impose a corresponding obligation on the corporation. In support of this construction, it is sought to give to the word 'maturity' a double signification, applying it to each payment of interest as it falls due, as well as to the principal. But this is extending, contrary to all legal rules, the operation of words by a forced construction beyond their real and ordinary meaning. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. . . . . The words 'to pay said bonds at maturity' do not bear the sense which is sought to be attributed to them. They evidently imply an obligation to pay both principal and interest when the time fixed for the payment of the principal has arrived, but not to pay the interest as it accrues. It is one thing to be required to pay principal and interest when the bonds have reached maturity, and a wholly different thing to be required to pay the interest every six months, and the principal at the end of thirty years. The obligations are so different that they cannot both

[1] July 2, 1864; 13 Stats. at Large, 356.
[2] United States *v.* Union Pacific R. R. Co. 91 U. S. 72. See, also, United States *v.* Kansas Pacific Ry. Co. 4 Dill. 367.

grow out of the words employed; and it is necessary to superadd other words, in order to include the payment of semi-annual interest as it falls due. Neither on principle nor authority is such a plain departure from the express letter of the statute warranted, especially when it leads to so great change in the condition annexed to the grant."

93. **A mortgage deed should so fully and accurately describe the bonds to be secured by it,** that their identity may be readily established. But any doubt or ambiguity arising from an imperfect or erroneous description may be removed by parol evidence. Thus, bonds of the Worcester and Somerset Railroad Company of Maryland, dated on the first day of October, were held to be embraced in a mortgage deed dated the twenty-fifth day of the same month, inasmuch as the bonds were in other respects clearly described in the deed, and there was nothing in the terms of the deed inconsistent with the fact that they had been before executed, and any uncertainty that existed on the subject had been removed by evidence that no other bonds were executed or issued by the company.[1]

94. **Power reserved in mortgage to dispose of property not necessary for the use of the road.** — A provision in a mortgage, which by its terms covers the present property of a railroad company, and its future acquisitions, its rolling stock, materials, machinery, and all other personal property, that the company might dispose of, or pledge property not used or not necessary for the road, provided it should apply all the proceeds to the use and benefit of the road, does not nullify the mortgage, as to those articles, and withdraw the lien of the mortgage as fast as such articles as broken wheels, rails, or ties, or the like, are cast aside. The exercise of this power is regarded as merely incidental, and necessary to the possession and working of the road.[2]

A provision that "nothing herein contained shall prevent the said company, before default in the payment of any of the said bonds, or the interest due thereon, from selling, hypothecating, or otherwise disposing of any of their said property, real or personal, not necessary in their judgment for the use of the said road, nor

[1] Butler *v.* Rahm, 46 Md. 541. See 1 Jones on Mortgages, §§ 343–356.

[2] Coopers *v.* Wolf, 15 Ohio St. 523, Brinkerhoff, C. J., and Scott, J., dissenting.

from collecting and applying any money due to the said company from any source whatever, provided said application shall not be to the prejudice of any holder of any of the said bonds," does not render the mortgage fraudulent and invalid. However suspicious such a power might be in the case of a mortgage of ordinary goods, the very nature of a railroad corporation, its business, the wear and tear of its iron, ties, and rolling stock, the constant necessity of replacing injured or worn-out appurtenances with new, forbids the inference of a fraudulent purpose. The power retained is in the interest of the mortgagees as well as of other creditors of the company, and of the company itself.[1]

95. Reservation of power to create a prior lien. —The Texas and New Orleans Railroad Company, in 1858, executed a first mortgage of its property with a special reservation, that whenever the company should procure from the State of Texas a loan of six thousand dollars per mile out of the school fund, and should execute its bonds to the state for the same, they should constitute a lien upon the property mortgaged prior and superior to the lien of the above mentioned mortgage. This reservation was made in pursuance of the law of 1856, which entitled the company to this school fund loan, and by which it was expressly provided, that the bonds given to the state should constitute a lien upon the road and charter rights of the company, including the road-bed, right of way, and all property owned by the company as necessary for its business; and that they should have a priority over all other claims against the company. Early in 1861 forty miles of the road remained still unfinished and the resources of the company were exhausted. The school fund loan for this portion of the line, on which the company had relied, was essential to enable it to complete the work, but the state could not advance any more school fund bonds, or at least did not. In this situation of affairs an act was passed[2] entitled "An act for the relief of the Texas and New Orleans Railroad Company," by which it was provided, among other things, that the company might issue a first mortgage upon this uncompleted portion of its road to the amount of $6,000 per mile, which should be a prior lien to the mortgage of 1868, provided the company would relinquish all claims to the state loan for that portion of the road. The mortgage was executed accordingly.

[1] Butler *v.* Rahm, 46 Md. 541.

[2] Act of Feb. 7, 1871.

The question afterwards arose whether the mortgage of 1858 or the mortgage of 1861 should have priority, the holders of the bonds of 1858 contending that although the company might have given such a lien to the state upon borrowing money of it, yet that it had relinquished this right, and therefore that these bonds and the mortgage thus became the first lien on the road and its appurtenances. Mr. Justice Bradley, delivering the opinion of the Circuit Court, upon this point said :[1] "This certainly could never have been the intention of the parties, for it would have been, on the part of the company, a piece of the greatest fatuity thus to surrender this most valuable resource for raising the means which were necessary to enable it to complete its road and works. And to my mind, it is proved quite conclusively, as far as parol proof and the contemporary acts of the company and all dealing with it at that time can go to prove a matter of this kind, that the Act of February 7, 1871, was regarded and intended as a permission and authority, given by the state to the company, to substitute some other lender in its place, and to subrogate its right of priority to such substituted creditor. The question is, could this be done? There seems to be no doubt that the state might have advanced the loan, received the company's bonds, and assigned such bonds to any other party, and might thus have substituted another party in its stead. The state might have proposed to A., thus: 'Advance this loan to the Texas and New Orleans Railroad Company for us, and you shall have the company's bonds to be received therefor.' No reasonable objection to such a transaction would have been made by prior mortgagees or bondholders. If either of these things could be done, why could not the state, in the exercise of its legislative power, have substituted another party in its place as lender, and authorized a subrogation of all its rights of priority to such lender? No substantial rights of any other persons or parties would have been thereby invaded. Acts of state legislation are to be sustained, if they do not invade any substantial and vested rights. If the legislature of the state, by the Act of 1861, did this, I can see no objection to the validity of the transaction." The bonds authorized by this legislation were issued for full value to parties who received them in good faith as a first lien upon that portion of the road; and the court held

[1] Campbell *v.* Texas & New Orleans R. R. Co. 2 Woods, 263.

that they were entitled to stand in the place of the state and have a first lien on such road.

Objection was made that the substituted bonds varied from those which the state was to give under the reservation contained in the first mortgage, and therefore that they could not be substituted, even by legislative aid, without impairing the obligation of the contract between the company and the bondholders of 1858. One variance relied upon in this way was, that the substituted bonds were made to run for a longer time, — for fifteen years, instead of ten years. But the court did not regard this as of the essence of the contract. There was no specific mention of the time of credit in the reservation made in the mortgage, though the statutes providing for the issue of such bonds directed the officers of the state to allow them to run for ten years. The substantial circumstance as between the company and the bondholders under the mortgage of 1858 was, that the company had the right to impose upon the road a loan of $6,000 per mile and make it a lien prior to the mortgage which secured their bonds.

Another variance relied upon was, that the substituted mortgage did not require a sinking fund to be reserved for the payment of the bonds, as was the case with the bonds which were to be given to the state. This, again, was not regarded as affecting the substance of the right as between the parties. It was rather a mode of providing for payment, and the company was neither richer nor poorer by reason of the sinking fund. This was a matter of detail for the officers of the state under the act authorizing the loan, but not a matter of essential concern to the bondholders.

But a variance in the rate of interest, the bonds to be given for the state loan bearing six per cent. interest, whereas the bonds authorized in their stead bore eight per cent. interest, imposed an additional burden upon the road beyond what was stipulated for. The rights of the bondholders under the first mortgage were therefore invaded to the extent of this increase in the rate of interest, and as against them the rate must be reduced to six per cent.

96. **The mortgage usually provides in some form for the payment of taxes by** the mortgagor while in possession. A provision in the condition of a defeasance of a mortgage given by a railroad company to secure its bonds, that the mortgage shall be void if the mortgagor well and truly pays the debt and interest

"without any deduction, defalcation, or abatement to be made of anything for or in respect of any taxes, charges, or assessments whatsoever," does not oblige the company to pay an income tax of five per cent. imposed by act of Congress upon the interest payable upon the bonds, and which such companies "are authorized to deduct and withhold from the payments on account of any interest or coupons due and payable." On the contrary, the company complies with its contract when it pays the interest, less five per cent., and retains the tax for the government. The provision has reference only to ordinary taxes imposed upon the company and the property in its possession.[1]

97. A provision in the bonds of a corporation for their conversion into the capital stock of the company at the pleasure of the holder is inseparably connected with the bonds themselves, and can be availed of only by a holder of such bonds, and only so long as he continues to hold them. He cannot assign this right of conversion, or his right of action for a breach of the stipulation for conversion, separate from the bonds. To recover in an action against the company for its refusal to convert the bonds, the plaintiff must aver and prove that he was at the commencement of his action the holder of the bonds for the conversion of which he brought suit.[2]

A privilege given in bonds issued by a company that the holders may convert them, at their option, within a specified time, into stock of the company, cannot be so exercised that a bondholder shall receive interest on his bonds and interest or dividends on the stock for the same period. Neither is he entitled to new stock issued to stockholders in place of dividends before he exercises his option to convert his bonds.[3] He is entitled merely to stock, and not to stock with dividends or interest thereon. If that were his right, the longer he delayed his election the more he would receive.

Under a statute authorizing railroad corporations to borrow money for certain purposes and to issue bonds secured by mortgages of the corporate franchises and property, and providing

[1] Haight *v.* Railroad Co. 6 Wall. 15; *S. C.* 1 Abbott C. & D. Ct. R. 81. See 1 Jones on Mortgages, § 358.

[2] Denny *v.* Cleveland & Pittsburg R. R. Co. 28 Ohio St. 108.

[3] Sutliff *v.* Cleveland & Mahoning R. R. Co. 24 Ohio St. 147.

that the "directors may confer on any holder of such bonds the right to convert the principal due or owing thereon into stock, under such regulations as the directors may see fit to adopt," it was held in *Belmont* v. *Erie Railway Company* that the directors of this corporation had the power to issue such convertible bonds, although the limit of the amount of capital stock fixed by its charter had already been reached, there being no condition imposed upon the right of the directors to authorize the conversion of such bonds into stock, except that the bonds be issued for the purposes specifically authorized; and this being so, it was further held that the directors had power to issue stock in conversion of such bonds.[1] It was declared, however, that if the court were satisfied that bonds were about to be issued by the directors, not for the payment of money actually borrowed for the purposes authorized by the statute, but as a part of a fraudulent device to increase the stock, the issuing of them might be restrained by injunction; and moreover, that while the bonds remained in the hands of any persons affected with notice that they did not represent a *bonâ fide* indebtedness, but were issued with such fraudulent design, the issuing of stock in conversion of the bonds might also be enjoined.[2]

This decision, that a corporation may, through the instrumentality of convertible bonds, issue stock after it has already reached the limit of its powers of issuing it, is of doubtful authority; but it illustrates one phase of the management of a great corporation, so much of whose history has been one of fraud and disaster from the beginning, reflecting no honor upon the great state whose courts have had so much to do in making up the humiliating record.[3]

98. A mortgage deed may be reformed. — A mortgage to trustees for bondholders, from which words of inheritance have been inadvertently omitted, will be reformed as against subsequent incumbrancers and purchasers, when it appears from the deed itself, as recorded, that the nature of the trust required that an estate in fee should pass by the deed. The New Jersey West Line Railroad Company made such a mortgage, and constructive

[1] Belmont *v.* Erie Ry. Co. 52 Barb. (N. Y.) 637; and see Ramsey *v.* Erie Ry. Co. 38 How. Pr. (N. Y.) 193, 217.

[2] Belmont *v.* Erie Ry. Co. *supra*, per Cardozo, J.

[3] See "Chapters of Erie," by Charles F Adams, Jr.

notice of the entire instrument was afforded by the record of it.[1] "It was a conveyance, by way of mortgage, in trust, and the estate intended to be conveyed to the trustees may be ascertained from the provisions of the trust itself. If they require for their execution that the trustees shall have an estate in fee, then an estate in fee will be held to have passed to them. The mortgage provides that, in case of default for the period of six months after presentation of coupons for interest and demand of payment, or default for six months in payment of principal, the trustees, or the survivors of them, or their successors, may sell and dispose of the mortgaged premises, and make and deliver to the purchaser or purchasers thereof good and sufficient deed and deeds in the law, in fee simple, therefor; and that the sale and conveyance so made shall be a perpetual bar, both in law and in equity, against the company, and all claiming or to claim the property under it, or its successors or assigns; and that the sale shall vest the right, title, estate, interest, property, and possession of, in, and to the premises, wholly and absolutely in the purchaser or purchasers. To execute this provision of the mortgage a fee in the trustees is necessary, for they could not convey a fee if they themselves had only a less estate. This provision is of itself evidence and notice of the estate intended to be conveyed by the mortgage, that it was an estate in fee. The mortgage, therefore, may be reformed, as prayed in the bill, in the words of conveyance and in the habendum clause, as against all the defendants."

[1] Randolph *v.* N. J. West Line R. R. Co. 28 N. J. Eq. 49.

The habendum of the mortgage was to the trustees, as joint-tenants, and not as tenants in common, and to the survivors of them, and their successors and assigns, as joint-tenants, and not as tenants in common as aforesaid, to the only proper use, benefit, and behoof of the trustees, and the survivor of them, and their successors and assigns, as joint-tenants, and not as tenants in common as aforesaid, forever, in trust nevertheless, &c. See 1 Jones on Mortgages, §§ 97–99.

CHAPTER III.

PROPERTY COVERED BY RAILROAD MORTGAGES.

I. What is embraced in a mortgage of the undertaking, 99–103.
II. What property passes as appurtenant to the franchise, 104–108.
III. What personal property passes as fixtures, or parts of the realty, 109–113.
IV. What is covered by a mortgage of the tolls and income of a railroad, 114–120.

I. *What is embraced in a Mortgage of the Undertaking.*

99. In England a railway mortgage usually embraces only the "undertaking" of the company, and the tolls and moneys arising out of the "undertaking." This is different from a mortgage of the property of the company.[1] By the term "undertaking" is meant the railway as a completed whole by which tolls and profits are earned. Various ingredients go to make up the undertaking, but these ingredients, strictly speaking, are not the subjects of the mortgage, but only the completed work from which the earnings come. The term undertaking is the proper style, not for the ingredients, but for the completed work. "It is in this sense, in my opinion," said Lord Cairns,[2] "that the 'undertaking' is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete, or to be completed, as a going concern, with internal and parliamentary powers of management not to be interfered with, — as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the legislature must not, under a contract pledging it as security, be destroyed, broken

[1] Perkins *v.* Pritchard, 3 Railw. & Canal Cases, 95; Hart *v.* Eastern Union Ry. Co. 6 Ib. 818; *S. C.* 7 Exch. 265.

[2] Gardner *v.* London, Chatham & Dover R. Co. L. R. 2 Ch. App. 201, 217; 36 L. J. Ch. 323.

up, or annihilated. The tolls and sums of money *ejusdem generis* — that is to say, the earnings of the undertaking — must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees, by seizing or calling on this court to seize the capital or the lands, or the proceeds of sales of land, or the stock of the undertaking, either prevent its completion or reduce it into its original elements when it has been completed."

The London, Chatham, and Dover Railway Company, having made a mortgage of its undertaking and the tolls and profits arising from that, a question arose upon default in the payment of the money received, whether a receiver should be appointed of the rents, and of the sale proceeds of certain surplus lands. Such lands in England may be acquired in one of two ways: they may be lands taken by the railway company in the belief that they would be required for its line, or for the stations and works connected with it; or they may be lands which the owner has forced the company to buy, in order that he may not have a severed part of a tenement or field left on his hands. In either case the company is obliged to resell the land within a limited time, applying the proceeds to the purposes of the company. "It is obvious from this," said Lord Justice Cairns, delivering the decision of the court,[1] "that the surplus land is in truth the representative and equivalent of a certain portion of the capital provided by the company for the execution of their works, which has — not for the purpose of profit, but for the protection of landowners — been temporarily diverted and invested in land to be again resold, and which is to return to the capital of the company when the object for which it has been diverted has been accomplished. And as regards the *interim* rents, if any, of surplus lands, they would appear to be in the same position as the income arising from capital provided by the company, and temporarily invested in any other manner until needed. The argument by which the debenture holders maintain their right to a receiver of the proceeds of the surplus lands is in substance this: They say they are mortgagees of the undertaking, and of the tolls and sums of money arising out of it, or by virtue of the act authorizing it; that all the land taken by the company under its parliamentary powers goes, in the first instance, to form a part of the undertak-

[1] Gardner *v.* London, Chatham & Dover Ry. Co. *supra*.

ing; that as soon as any land becomes surplus land, it becomes subject at the same time to the parliamentary provision for its resale, but the sale moneys are in return subjected to this trust; that they are to be applied for the purposes of the special act, that is, for the purposes of the undertaking; that these moneys, therefore, become and form a part of the undertaking, and therefore of the security, and ought to be preserved and applied for them by this court. It is necessary to observe carefully to what length this argument must go. A railway is made and maintained by means of its capital, by means of its borrowed money, of its land, of its proceeds of sale of surplus land, of its permanent way, of its rolling stock. All these may be said, in a sense, to be connected with, to be parts of, to make up, the undertaking. If a mortgage of the undertaking carries *in specie* the sale moneys of surplus lands, it must equally, and on the same principle, carry *in specie* the ordinary land of the company, the capital, the permanent way, the rolling stock, nay, even the very money itself lent on the mortgage. The assignment made by the mortgage debenture is immediate, and is to continue for three years at the least. If the debenture holders are right in their argument, they become immediate assignees *in specie* of all the ingredients which I have enumerated as going to make up the undertaking, and they might from the first have asserted their rights as mortgagees by taking and impounding, not merely the proceeds of surplus lands, but the capital, the cash balances, the rolling stock, and even their own money advanced. Now, it is beyond question that the great object which parliament has in view, when it grants to a railway company its compulsory and extraordinary powers over private property, is to secure in return to the public the making and maintaining of a great and complete means of public communication; and yet, according to the necessary consequence of the plaintiffs' argument, the moment the company borrowed money on debentures it would depend on the will or caprice of the debenture holder whether the railway was made at all." In conclusion, it was held that the debentures did not constitute a mortgage of the whole of the property and effects of the company, as parts of the undertaking; and therefore that the sale moneys of the surplus lands were not embraced in the mortgage. The company having given a charge upon these lands to contract-

ors to the railway, a receiver was appointed of the proceeds of the sale of them in favor of the assignees of the contractors.

100. The word "undertaking," having no settled meaning, must be construed with reference to the obvious intention of those who employ it. While the word does not, *primâ facie*, include the lands of the company, it does not necessarily exclude them. As declared by Mr. Justice Coleridge,[1] "That word is ambiguous, and may be construed as meaning the speculation generally, or possibly it may be taken to include the land itself." This point is further illustrated by the case of the New Brunswick and Canada Railway Company. By various acts of the imperial and colonial legislatures, this company was entitled to grants of a large amount of land not connected with or necessary for the completion of the railway. This land the company had taken as a land company, with the object of making it a source of profit by sale and otherwise. It issued debentures, mortgaging to each holder the undertaking, and all moneys to arise from the sale of lands, and all future calls, and all tolls, engines, rolling stock, and all the estate, right, title, and interest of the company in the same, provided, that nothing therein contained should be held to limit the power of sale or appropriation by the company of any of its lands, nor constitute a charge upon them. Certain judgment creditors of the company issued execution against the land of the company, whereupon the debenture holders, in order to protect the lands of the company, and restrain a sale of the lands by the judgment creditors, instituted a suit in the Supreme Court of New Brunswick, and obtained an order appointing a receiver. A motion for an injunction having been refused by one of the judges, and upon appeal, again refused by the Supreme Court of Judicature of the province, an appeal was taken to the Privy Council, which affirmed the decree of the provincial court.[2] Lord Chelmsford, delivering the opinion, said that the proviso was not inconsistent with the sweeping and general terms of the debenture, but merely explanatory of them. "It seems clear to their lordships that the lands not being in terms granted by the mortgage debentures, the proviso makes the intention of the par-

[1] Myatt *v.* St. Helen's & Runcorn Gap Ry. Co. 2 Q. B. 364.

[2] Wickham *v.* New Brunswick & Canada Ry. Co. L. R. 1 P. C. 64; 1 Cox's Joint Stock Cas. 519.

ties perfectly clear, that no general expression used in the grant was intended to comprehend them, and therefore that the debenture holders are not entitled to interfere with the sale of the lands under the execution issued by the judgment creditors. But the debenture holders insist, that, if they cannot stop the sale of the lands, they are entitled, under the terms of the debentures, to all the moneys arising from such sale. It is quite clear, however, that the sales contemplated by the grant are those which are to be made by the company in the course of their regular operations. The judgment creditors take what belonged to the company, but do not take under them ; and a sale by the sheriff under an execution is a sale by law, and not by the company. It is clear, upon the whole case, that the lands of the company did not pass to the mortgagees under the debentures, nor are they entitled to the proceeds of the forced sales."

101. The word undertaking is frequently used in connection with other general words, and the effect of that word, and of the others as well, is to be determined in some measure by the connection ; and especially is this the case in reference to the question whether the charge is upon the income merely, or as well upon the property. A mortgage of "the undertaking and all the real and personal estate" was held to include all the personal estate then existing, but not personalty subsequently acquired.[1] A company whose business was to buy and sell land, to build, buy, and sell houses, to furnish houses for hotels, and to carry on the business of hotel-keepers, pledged "the property belonging to us for the time being, during the subsistence of the debenture, with all the buildings and stock on, and connected with, our said property, and all the receipts and revenues to arise therefrom," and declared that the entire debenture loan and interest should be a first charge on "our undertaking, and property, and receipts, and revenues aforesaid." Upon the winding up of the company, it was held that the effect of the debentures was to give the holders a charge, in priority to other creditors, upon the land and other property of the company.[2]

Whether the term undertaking constitutes a charge upon the

[1] New Clydock Sheet & Bar Iron Co. *in re*, L. R. 6 Eq. 514.

[2] Marine Mansion Co. *in re*, L. R. 4 Eq. 601. See, also, General South American Co. *in re*, 2 Ch. D. 337.

income merely, or as well upon the property itself, depends very much upon the purpose of the corporation and the nature of the property involved. When the property consists of a permanent railway, all parts of which are essential to the continued existence and operation of the company, whose charter was granted for the purpose of securing the public convenience, it is not consistent with the policy of the English law to allow the property itself to be mortgaged, sold, or dealt with in any way, so as to endanger the permanent maintenance of the railway; and, therefore, a mortgage of the undertaking is construed, with reference to the peculiar subject matter to be affected, to mean the income of the property and not the *corpus* of it.[1]

102. **The mortgage debenture in common use in England is not accompanied by any separate instrument,** such as a bond or note, affording a personal remedy against the corporation; but the mortgage itself usually contains a covenant for the payment of the principal of the loan. Such a debenture in the usual form was made by the Eastern Union Railway Company, by which it assigned "the said undertaking, and all the estate, right, title, and interest of the company in the same, to hold until the sum of £1,000, together with interest for the same at the rate of £5 for every £100 by the year, be satisfied; the principal sum to be paid on the 1st day of January, 1851." The question arose whether this instrument afforded a personal remedy against the company. Baron Parke, delivering the opinion of the Court of Exchequer, holding that an action was maintainable upon it,[2] said of this instrument: "The first part merely assigns, in consideration of £1,000, the undertaking, and all the tolls and sums of money arising by virtue of the act, to hold until the sum of £1,000, with £5 per cent. interest per annum, should be satisfied. If the instrument had stopped there, it would have operated simply as a transfer (commonly, but improperly, called a mortgage) of the subject matter till the sum was satisfied thereout. The subject conveyed would be the tolls, certainly the unpaid calls, and all that belonged to the company as the proprietors of the railway, which any one is at liberty to use on paying tolls, but not the stock or property belonging to the company as common

[1] See L. R. 5 Ch. 321, per Gifford, L. J.

[2] Hart *v.* Eastern Union Ry. Co. 6 Railw. & Canal Cas. 818; *S. C.* 7 Exch. 246, 265.

carriers of passengers or goods for hire, nor, according to the case of *Myatt* v. *St. Helen's*,[1] the soil of the railway itself. The railway acts have been prepared on the model of the canal acts, in which the principal object of the company is the proprietorship of the canal, and the profit there arises from the use of it by the public in general; but soon after the establishment of railways, it was found that the companies alone could use them beneficially, by themselves monopolizing the conveyance upon them; so that the theory of these acts and the practice under them are entirely at variance. So far, the instrument we are considering would give no right of action to the plaintiffs, and would resemble *Pontet* v. *Basingstoke Canal Company;*[2] but in the conclusion there is a stipulation that the principal is to be paid on the 1st of January, 1851; and this certainly imports a covenant by the company that the same shall be repaid, unless there be something in the acts to qualify or alter the meaning of that expression. The effect, then, of the instrument would be to pledge the tolls and property of the company as proprietors, but not their stock or property as carriers; and to impose an obligation on them to repay the principal on a certain day, for the breach of which an action would lie against the company, the judgment in which action would be satisfied out of their general property not comprised in the pledge, belonging to them as carriers or otherwise." A writ of error having been brought on this judgment, it was affirmed.[3]

103. In England future calls on the shareholders cannot be mortgaged without express legislative authority, so as to preclude the company from receiving and applying them to the purposes of the company.[4] Existing unpaid calls, even, will not be included in a mortgage, unless there are clear words showing an intention to include them; thus, where the terms employed were, "all the lands, tenements, and estates of the company, and all their undertaking," it was held that calls, whether to be made or whether made and remaining unpaid, were not included.[5]

[1] 2 Q. B. 364.

[2] 3 Bing. N. C. 433.

[3] Eastern Union Ry. Co. *v.* Hart, 8 Exch. 116.

[4] British Provident Life & Fire Ass. Co. *in re*, 4 De G., J. & S. 407; Sankey Brook Coal Co. *in re*, L. R. 10 Eq. 381; Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, § 43; Gardner *v.* London, Chatham & Dover Ry. Co., per Cairns, L. J. L. R. 2 Ch. 201, 215.

[5] King *v.* Marshall, 33 Beav. 565.

II. *What Property passes as appurtenant to the Franchise.*

104. Under a mortgage of a road, "with its corporate privileges and appurtenances," only such property passes as is directly appurtenant to the road and is indispensably necessary to the enjoyment of its franchises. Therefore such a mortgage does not cover town lots adjoining the road-bed, without specific mention of the lots, although purchased by the company ostensibly for a basin to connect the road with river navigation, unless as a matter of fact such lots are essential to the enjoyment of the corporate franchises.[1] Upon the relation of such property to the road, Mr. Justice Agnew said: "So far as the railroad was involved, its purposes were of a public nature, — the transportation of freight and passengers; but so far as the company prosecuted the coal trade, it was an object of private gain, not essential to the railroad franchise, and which they might or might not prosecute at pleasure. Now, admitting that the company might, by implication from the language of the charter, establish a basin, as a device for the more convenient carrying on of the coal trade, yet it was a work not essential to the railroad franchise involving the public interests, and therefore one the company might establish or withdraw at their pleasure. A basin may be very convenient to enable boats to approach a railroad and take freight from its cars; but clearly it does not belong to it, constitutes no essential incident, and, therefore, like warehouses, coal-yards, machine-shops, &c., is an independent structure."

A mortgage of all the franchises, lands, and appointments of the main line of a railroad, then owned by the company or thereafter to be acquired, does not include a lateral branch, or extension subsequently made.[2]

A mortgage of the main line of a railroad and its appurtenances, located in the State of Arkansas, does not cover real estate, depot buildings, and track ways, situated in Tennessee, across the state line from the terminal point of the main railroad line; but such property is subject to attachment in the courts of the latter state.[3]

[1] Shamokin Valley R. R. Co. *v.* Livermore, 47 Pa. St. 465.

[2] Randolph *v.* N. J. West Line R. R. Co. 28 N. J. Eq. 49.

[3] Buck *v.* Memphis & Little Rock R. R. Co. 4 C. L. J. 430. See § 162.

105. Change of route. — A mortgage conveying the franchise of a railroad company and all property to be acquired, covers the road as built, although a change be made in the route from that originally contemplated and described in the mortgage. The purchasers at a foreclosure sale under such mortgage acquire all the title to the road that the bondholders had a right to have sold; or, in other words, title to the road as constructed.[1]

In Iowa, it is provided that upon a change of location or removal of the line of road, all mortgage liens and other incumbrances on the line of road which the company is authorized by the court to change shall remain valid liens and incumbrances on the line of road to which the change is made, and shall take priority of all other liens and incumbrances upon such new line of road.[2]

It is also provided in Ohio that when any railroad company shall, with the written consent of three fourths in interest of the stockholders, change its line or any part of it, either partly or wholly constructed, or the proposed termini, and shall file a copy of the resolution with the secretary of state, the record of any mortgage the company may have executed to secure bonds for the construction of such a road, in each county through which the changed line of such railroad shall pass, is as effectual to create a lien upon the changed line of such railroad and upon all the property of such company as if such mortgage contained a complete description of such changed line and of such property.[3]

106. Woodland not connected with the road. — The Racine and Mississippi Railroad Company made a mortgage of its road and superstructure, track, and all appurtenances, made or to be made, the land upon which the road had been or should be constructed, including the depots, shops, engine-houses, and other constructions at the termini and along the line of the road, and the land upon which the same were erected, and that which should be used for depot and station purposes. The company afterwards purchased a large tract of woodland, situated seven miles from the road, for the purpose of supplying it with timber and fuel. Upon a foreclosure of the mortgage it was insisted that this tract of land was embraced in the mortgage; but the Supreme Court

[1] Elwell *v.* Grand St. & Newtown R. R. Co. 67 Barb. 83.

[2] Laws 1876, ch. 118, § 5.

[3] Laws 1876, ch. 115.

of Wisconsin held otherwise upon the ground that this land was not included within the express terms of the mortgage.[1]

A mortgage of a railroad, its property and franchises, does not without special mention include land purchased under the authority of a provision in its charter which authorized the company to hold such an amount of land, not exceeding five acres in any one place, and improvements, at the termination and along the line of the road necessary for water stations, the accommodation of passengers, and the shipping of goods, and for shops and like purposes, if the land so purchased be not appropriated or used for these purposes.[2]

107. **Canal boats** owned by a railroad company and used by it in connection with its road, but beyond the terminus of it, are not included in a mortgage of the road which does not specify them, except under the general description of "all other personal property whatsoever in any way belonging or appertaining to the said railroad." The boats might be said to be in a general way accessory to the business of the road, but they cannot be said to belong or appertain to the road.[3]

Although a corporation, in excess of the powers conferred upon it by its charter, purchase and pay for steamboats and canal boats, it may, when once in possession of such property, make a valid mortgage of them. Neither the corporation nor any one claiming under it can set up a violation of its chartered powers to defeat the title of a mortgagee. On the other hand, the mortgagee having sold the property under his mortgage cannot on this ground excuse himself from accounting for the proceeds of the sale upon the mortgage debt.[4]

108. **An equitable right of action may be the subject of a mortgage,** yet it is important that such right should be described, both in the mortgage and in the advertisement of the sale under it, so that it shall be apparent that the intention was to include the right in the mortgage and the sale. The La Crosse and Milwaukee Railroad Company having mortgaged its road, afterwards

[1] Dinsmore *v.* Racine & Miss. R. R. Co. 12 Wis. 649.

[2] Youngman *v.* Elmira & Williamsport R. R. Co. 65 Pa. St. 278.

[3] Parish *v.* Wheeler, 22 N. Y. 494.

[4] Parish *v.* Wheeler, 22 N. Y. 494; and see Bissell *v.* Mich. South. & North. Ind. R. R. Co. Ib. 258.

sold and conveyed one branch or division of it to the Milwaukee and Western Railroad Company, which assumed the payment of a portion of the mortgage debt, and covenanted that upon default in the payment of the principal or interest of such portion the former company might reënter upon the premises and foreclose and sell the same. Subsequently the La Crosse and Milwaukee Company executed another mortgage of its line of road from Milwaukee to La Crosse, with all the real property, rolling stock, and franchises connected with the road, together with all the bonds, negotiable paper, accounts, "causes of action, demands and choses in action, of whatever nature," which the company might own or have any interest in on the day of its first making default on the bonds secured by the mortgages. Default was made under this mortgage, and the property as described in the mortgage was sold under a power of sale, and was bought by a trustee in behalf of the bondholders. The purchaser claimed the benefit of the covenant made by the Milwaukee and Western Company in favor of the La Crosse and Milwaukee Company, and sought to enforce it by suit. It was held, however, that whether a right to enforce the covenant could be mortgaged by general language like that contained in this mortgage or not, still such a right would not pass by a sale under the power without a more definite description in the notice of sale, so that purchasers might know what they were purchasing.[1] Mr. Justice Cole, delivering the opinion of the court, said: "A sale at auction and upon notice implies that there is some designation of the thing offered to be sold, so that persons whom the law invites to such auction may be able to know where and what is the property they are about to purchase. In case of selling a railroad, it might be sufficient to designate the property sold as a railroad between given points, with its rights, privileges, and franchises. But it seems to me, if choses in action and legal instruments are to be sold, there ought to be some description or designation of them. Otherwise such sales will be a mere idle ceremony, resulting frequently in great injury to the debtor company, and leading to the most fraudulent speculations. If the covenants in this indenture were actually sold by the trustee, and he bid in reference to them, it should be so averred."

Book debts of a company may be mortgaged under a power to raise money by mortgage, with or without power of sale, of any of

[1] Milwaukee & Minn. Ry. Co. *v.* Milwaukee & Western R. R. Co. 20 Wis. 174.

the property of the company. Such debts, whether accrued or not, are property.[1]

III. *What Personal Property passes as Fixtures or Part of the Realty.*

109. A railroad track laid down for the permanent use of the road is a fixture and a part of the realty. But a track may be personal property and no part of the real estate. Whether in any case it be realty or personalty is perhaps a mixed question of law and of fact, like most questions as to fixtures. A track laid, for instance, for the purpose of taking gravel from gravel pits, may be realty or personalty; and in determining which it is, the purpose with which it was put down is of more importance than the manner in which it is annexed to the land. If permanent in its character and use, or intended to be appropriated to the land for its use and benefit, and adapted to any use or purpose to which the land could be put, and if at the same time it is so laid that it cannot be easily moved, it is a part of the realty and passes by a conveyance. But if the track was neither originally built upon the land for the use and benefit of the land, nor in anywise adapted to the uses to which the land could be put; and if the structure be not of a permanent character, but temporary, so that it could be easi y moved on the ground and taken therefrom without any injury to the land, and it was not intended by the parties who built it and owned the land at the time it was built that it should be appropriated to the use of the land, but simply to enable the railroad company to take the gravel from the land, the track would not be a fixture or appurtenance belonging to the land, but personal property, which might be removed by the owner of the track without incurring any liability to the owner of the land.[2]

110. Material placed upon the land of a railway for use in repairing the road, such as iron rails, chairs, spikes, and ties, constitute a part of the realty and pass by a mortgage of the road.[3] "Nor do we want analogies in the well settled principles of the common law to hold that materials provided and designed to be attached to the road are, for the purposes of a mortgage or a con-

[1] Bloomer *v.* Union Coal & Iron Co. L. R. 16 Eq. 383.

[2] Van Keuren *v.* Central R. R. Co. of N. J. 38 N. J. L. 165; *S. C.* 13 Am. Ry. R. 43.

[3] Palmer *v.* Forbes, 23 Ill. 301, 302.

veyance, a part of the real estate itself. It is a familiar principle to all, that rails hauled on to the land, designed to be laid into a fence, or timber for a building, although not yet raised, but lying around loose, and in no way attached to the soil, are treated as a part of the realty, and pass with the land as appurtenances. By applying these familiar principles of the common law, we may be enabled to determine what we should consider as appurtenant to the freehold, and what should pass by a conveyance of the road, and consequently what is covered by and embraced within a mortgage encumberingthe road, acknowledged and recorded as a mortgage of real estate." [1]

111. **An iron safe not attached to the freehold** is personal property, and liable to be taken on execution against the company; and an iron planing-machine is also personal property, unless it is so connected with and attached to the realty as to indicate that it is designed to be permanent, or its removal would be injurious to the freehold.[2]

That such property as station-houses, engine-houses, freight-houses, and the workshops of a railroad company, with their appurtenances, and also piers and wharves and their appendages, when annexed to land of the company covered by a mortgage, become part of the realty embraced in the mortgage, would be questioned by no one. But tools and implements in the workshops, and furniture in station-houses, and all other property of a personal nature, such as is commonly used for other than railway purposes, are not part of the realty subject to such mortgage.[3]

112. **Cast-off articles, such as broken wheels, broken rails, broken ties,** and other scrap and refuse iron, once forming a part of the road, or used in its operation, and subject to a mortgage of it, but which have ceased to be of any value to the company, except for sale, or for recasting into new articles for the use of the road, still remain subject to the lien of the mortgage, if a proper management of the road required that they should be repaired, recast, or exchanged for new articles.[4] "If such property is lia-

[1] Chief Justice Caton in Palmer *v.* Forbes, *supra*.

[2] Titus *v.* Mabee, 25 Ill. 257. See § 141.

[3] Williamson *v.* N. J. Southern R. R. Co. 28 N. J. Eq. 277, 284, per Runyon, Chancellor.

[4] Coopers *v.* Wolf, 15 Ohio St. 523.

ble to execution," said Mr. Justice Welch, delivering the opinion of the court, "where shall we draw the line between the property of the mortgagees and that of the company? When a bridge breaks down, or a tunnel falls in, or when trains are thrown from the track and broken, shall executions be immediately levied upon the stone, the timbers, and the broken cars or engines? Shall creditors of an insolvent company line its track, and watch for and seize its worn-out rails, broken wheels, fragments and scraps, as fast as they come to hand; their priority over each other depending on their diligence in the business? If so, it is easy to see that the security of the mortgagees, which depends, ultimately and almost solely, upon the ability of the road to run, and produce a revenue, would be seriously impaired. Besides, it would be almost impracticable to mark the boundary between the rights of the mortgagees and those of the judgment creditors, and the result would be a scramble between creditors, continual litigation, without any nearer approximation to justice and equity between the parties."

113. Coal, wood, oil, and property of like description intended for daily consumption, are personal property, and subject to the rules that govern the transfer of such property.[1]

In a case before the Supreme Court of Illinois, the question whether fuel, office furniture, and other detached property of like nature, of a railway company, was embraced within a mortgage executed and recorded as a mortgage of real estate, was considered in all its aspects.[2] It was first determined that such property could not be considered as attached to the realty, or as savoring of it so as to pass as fixtures, or incident to it. "When it became apparent," said Mr. Justice Walker, delivering the opinion of the court, "that the exception was untenable, that it was real estate, then refuge was sought under the broad mantle — franchise; and wood, coal, writing-desks, stationery, and all kinds of household furniture, which could not be called real estate, and must not be called chattels, and subject to the rules of law governing such property, were called franchise. What, then, is this franchise which it is claimed may transmute personal into real estate, and change the very nature and use of things in such a

[1] Palmer *v.* Forbes, 32 Ill. 301, 302. See § 140.

[2] Hunt *v.* Bullock, 23 Ill. 320.

manner? It is only an immunity, privilege, or exemption from the ordinary burdens and restrictions to which the citizens of the state or government are generally subject, and is usually granted to bodies corporate or politic, for public convenience. This privilege, or the franchise, when granted to such bodies, is found alone in their charters, or the law which brings them into existence. In all other things outside, and independent of their charter privileges, they have always been held amenable to, and are governed by, the general laws of the state, to the same extent and in the same manner as individuals. The courts are powerless to extend their privileges beyond the grant contained in their charter, either in express terms, or from necessary implication, to effectuate the objects of their creation."

It was likewise urged, that railroad companies, in executing mortgages or deeds of trust, are not required to conform to the statute regulating chattel mortgages, in respect to property which is purely personal; that public policy requires that effect should be given these instruments in despite of the statute; but the court held the statute to be as obligatory upon railroad companies as upon other corporations or upon individuals. "That these corporations, when they mortgage their road, tracks, and franchises, thereby mortgage all of the permanent fixtures, such as the road equipments for their continued use, and connected with them, we have no doubt. And by such a mortgage all future additions to it, of the same permanent nature, being an incident to the real estate, must become subject to the mortgage as do improvements to other real estate mortgaged by individuals. So of repairs to personal property of the road legally mortgaged, and not designed for daily consumption. But that fuel, office furniture, stationery, materials for lights, and all other detached property of that character is personalty, we have no hesitation in determining. To hold otherwise would, it seems to us, involve us in an absurdity, if followed to its inevitable consequences, that we are not prepared to adopt, for the purpose of relieving against what might appear to be a hardship in a particular case."

In Indiana, however, it has been held that a mortgage of a railroad and its appurtenances, "with the superstructure, rails, *and other materials used thereon*," embraces wood provided for the use of the road from time to time.[1] Although such property may

[1] Coe *v.* McBrown, 22 Ind. 252.

be levied upon by a creditor of the railroad company, and the mortgagee is not entitled to an injunction against the proceeding, because the mortgagor's right of redemption is a leviable interest, yet the purchaser at the sheriff's sale is not entitled to possession of the property sold until he complies with the conditions of the mortgage.[1] Practically, therefore, under this rule, there can be no effectual levy upon the mortgaged property.

IV. *What is covered by a Mortgage of the Tolls and Income of a Railroad.*

114. The earnings of a railroad, while it is allowed to remain in the possession of the mortgagor, are not subject to the lien of the mortgage, although in terms the mortgage covers the tolls of the road, if at the same time the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession.[2] Thus the Des Moines Valley Railroad Company executed to trustees a mortgage of its road, property, and franchises, "together with the tolls, rents, and profits, to be had, gained, or levied therefrom." The mortgage provided that after default continued for a certain period, the trustees might enter and take possession; but that until such time the mortgagor should have the sole right of possession, use, and management of the mortgaged premises. The mortgagees subsequently commenced a suit to foreclose the mortgage, but did not take possession of the property or ask for the appointment of a receiver in the suit. Pending the suit a creditor of the company obtained judgment against it, and attached as garnishee an agent of the company who had money belonging to it received from the sale of passenger tickets and for freight charges. A receiver was subsequently appointed in behalf of the mortgagees, who also claimed the funds attached in the hands of the agent and received by him before the appointment of the receiver. The Supreme Court of the United States adjudged that the mortgagees had no right to the earnings of the road until they took possession through the receiver.[3] "Possession," said Mr. Justice Swayne, delivering the opinion of the court, "draws after it the right to receive and apply the income. Without this the road could not be operated,

[1] Coe *v.* McBrown, *supra.*

[2] Merchants' Bank *v.* Petersburg R. R. 24 Pittsburg L. J. 192.

[3] Gilman *v.* Illinois & Miss. Telegraph Co. 91 U. S. 603.

and no profits could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist. They in no wise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could at any moment invoke the aid of the law, or interpose themselves without it."

The same question had previously been passed upon by the Supreme Court of the United States in the case of *Galveston R. R. Co.* v. *Cowdrey*.[1] The mortgages conveyed the road and other corporate property, and all tolls, issues, and profits, whenever default should be made in paying the bonds; but they provided that so long as no default was made in payment of principal or interest, the property should remain in the company's possession; but if it should be in default for the space of three months in payment of either, and on request in writing by any holder of the bonds, the trustees might take actual possession of the road, and, after notice, sell the same. The trustees claimed that they were entitled under the mortgage to the tolls and income received by the purchasers of the road during the time it was operated by them after default and before possession was taken under the mortgage; but the court were of opinion that the clause of the mortgage providing for the taking of possession under it pointed out the manner in which the pledge of the tolls and income was to be practically carried into effect; and they held that at any rate until a regular demand for the tolls and income was made, the purchasers in possession of the road were not accountable for them.

Again, in a still more recent case, the Supreme Court of the United States has reiterated its decision that a pledge of rents and profits can be made available to the mortgagee only upon his taking possession himself or having a receiver appointed and put in possession.[2] The mortgage in this case included, besides the

[1] 11 Wall. 459.

[2] American Bridge Co. *v.* Heidelbach, 94 U. S. 798; 4 C. L. J. 367, citing and approving Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459; Gilman *v.* Illinois Telegraph Co. 91 U. S. 603.

bridge, "the rents, issues, and profits of said bridge, as far as the same are not required to pay the necessary expenses of keeping in repair and operating said bridge, which rents, issues, and profits . . . . are hereby pledged to the payment of said interest as it matures." It was further provided that after default for a certain period the mortgage trustees might take possession. A judgment creditor of the bridge company claimed priority of payment out of money in its possession, and out of rents due to it from a railroad company, while the mortgage trustees sought to have these funds applied upon the mortgage; but the court held that inasmuch as the trustees had not taken possession they were no more entitled to these funds than they would be to property that was never within the scope of the mortgage. Of course, after the trustees under such a mortgage have taken possession, the earnings belong to them and are no longer subject to garnishment.[1]

Under such a mortgage, also, it seems that after specific income of a road has been set apart by the corporation for the payment of interest on its bonds and as a sinking fund for their redemption, by agreement with the mortgagees, although in advance of the earnings of the money, it is not subject to attachment by a creditor of the corporation. Such income is in that case specifically pledged to the use of the bondholders, and becomes theirs as soon as it is earned.[2]

115. The earnings of a railroad company, before foreclosure or possession taken by the trustee, are liable to garnishment, although included in a previous mortgage, where this provides that until default the company may possess and use the road, and receive the rents and profits arising from it.[3] Thus the Mississippi Valley and Western Railway Company conveyed[4] its "rights, powers, franchises, emoluments, income, and property," to trustees by a mortgage, which provided that after a default continued for six months it should be the duty of the trustees, upon request of a certain portion of the bondholders, "to

[1] Galena & Chicago Union R. R. Co. *v.* Menzies, 26 Ill. 121.

[2] Galena & Chicago Union R. R. Co. *v.* Menzies, *supra*.

[3] Smith *v.* Eastern R. R. Co. 124 Mass. 154; Ellis *v.* Boston, Hartford & Erie R. R. Co. 107 Mass. 1; Bath *v.* Miller, 51 Me. 341; 53 Me. 308; Noyes *v.* Rich, 52 Me. 115, overruling Woodman *v.* York & Cumberland R. R. Co. 45 Me. 207; Merchants' Bank *v.* Petersburg R. R. 34 Leg. Int. 240.

[4] Mississippi Valley & Western Ry. Co. *v.* U. S. Express Co. 81 Ill. 534.

enter, forthwith, upon the railroad property," and to use and operate it until all over-due coupons should be paid, or until the road and its property should be sold pursuant to the power in the mortgage, or under a decree of court; but until default the company is to possess and use the road and property, and receive the rents, profits, and income arising therefrom. Earnings of the company in the hands of the United States Express Company were attached by garnishee process, whereupon the mortgage trustees interpleaded, claiming the amount due from the express company as belonging to them under the mortgage. The court, however, was unable to discover an intention to vest a right to the income in the trustees, until default in the condition and possession taken by the trustees. While it is the duty of the railroad company to apply the income, after payment of current expenses, including necessary repairs and improvements, to the liquidation of the interest due upon its bonds, "this obligation, of its own force, no more carries title to the particular money received as income to the bondholders or trustees, than does the obligation to pay a debt, in ordinary cases, carry title to the creditors of the money in the debtor's pocket. The fact that the mortgagor is in possession, operating the road, renders it indispensable that he shall pay current expenses, and necessary repairs and improvements, and that he shall exercise his judgment and discretion as to the extent repairs and improvements shall be made; and this can only be paid out of the income. It is inconsistent with such control over the income that it shall be the property of the trustees."

The views of the court in this case were grounded upon the common law rule that the mortgagor is not required to account to the mortgagee for rents and profits while he remains in possession.[1] The railroad company was incorporated by acts of the legislatures of the States of Iowa and Missouri, and its road was located in those states, although its cars were also run over the bridge which crosses the Mississippi River at Quincy, and into the State of Illinois. It was insisted, therefore, that comity required that the court should follow the construction of this question given by the Supreme Court of Iowa, which had decided that the income of a railroad under such a mortgage belongs to the trustees, and could not be reached by process of garnishment at the

[1] Jones on Mortgages § 670; Moore *v.* Titman, 44 Ill. 367, 371.

instance of creditors.[1] But the court of Illinois declined to follow the ruling in Iowa, on the ground that comity in no case required that court to follow other than what it regarded as the clearly established law of the foreign jurisdiction, with reference to the contract to be affected by it. Here the contract was affected by the laws of two foreign jurisdictions. Neither is superior to the other. While the law of Iowa was known to the court, that of Missouri was not; therefore the case was regarded as one in which the obligations of inter-state comity, in the application of the law, cannot be appealed to, and the court must follow that construction which it believes to be authorized by law.[2]

116. **At law a railroad mortgage cannot be made to operate upon the future earnings** of the road as against attaching creditors of the company. The European and North American Railway Company executed a mortgage of "all its right, title, and interest in and to all and singular its property real and personal, of whatever nature and description, now possessed, or to be hereafter acquired, including all its rights, privileges, franchises, and easements." Subsequently it entered into a contract with the Eastern Express Company to carry their freight for five years at a stipulated price, to be paid in monthly instalments. Upon the first day of November, 1875, the express company became indebted to the railroad company for a month's service under the contract. On that day the express company was summoned as trustee of the railroad company. The trustee under the mortgage took formal possession of the road on the twenty-seventh day of October preceding, for condition broken. He claimed the monthly payment in the hands of the express company, as covered by the mortgage. The Supreme Court of Maine[3] decided against this claim. They regarded the contest as one where legal and not equitable rules are to prevail, the action being at law. The contract with the express company did not exist at the time of the mortgage, even if this could be held to include it under the general terms of the description. At law, therefore, the contract was not assigned by the mortgage. Neither does it come within any of the modifications of the common law principle that

[1] Dunham *v.* Isett, 15 Iowa, 284.

[2] Mississippi Valley & Western Ry. Co. *v.* U. S. Express Co. 81 Ill. 534.

[3] Emerson *v.* European & N. A. Ry. Co. 67 Me. 387.

a conveyance cannot be made of what does not at the time exist. Such a contract is not accessory to the road or its franchise, or any of its property. Moreover, even in equity an assignment of claims not then existing, to be upheld, must be of such claims as both parties expected would exist. In conclusion, the court say that the portion of the fund earned before the trustee took possession cannot be regarded as any part of the property mortgaged, but rather the earnings derived from the use of such property by the mortgagor in possession. The trustee is entitled to the earnings of the road from the time he took possession, and therefore the monthly payment should be apportioned, and the trustee charged for the part earned at the time the trustee took possession.

117. **Only the net income of the road, after the payment of all expenses,** so long as the mortgagors remain in possession, is covered by a mortgage of all the tools, income, rents, issues, and profits of a railroad, which also provides that upon default the mortgagees may take possession, work the road, and apply the net income to the payment of the debt, but that until default the mortgagors shall remain in possession. Therefore, the railroad company, while in the possession and management of the road, may contract for such articles as enter into the expense of maintaining and operating the road, and a creditor furnishing such articles may attach, by trustee or garnishee process, tolls due to the mortgagors from another corporation.[1]

A mortgage made by the Virginia and Tennessee Railroad Company conveyed its property *in esse*, and all it might afterwards acquire, with all tolls, issues, and income, and provided that the company might remain in possession until default, and should have the right to apply any of the money or personal property of the company to the construction or repair of the road or to its current expenses, or the payment of debts; and moreover should have the right, after deducting from the net profits an amount sufficient to pay the interest on its bonds, and to lay aside a sinking fund of one per cent. upon the amount of the bonds, to distribute the balance in dividends; and further, that in case of default, the trustees should take possession of the road and use the same according to the rules and regulations and lawful directions of the

[1] Parkhurst *v.* Northern Central R. R. Co. 19 Md. 472.

president and directors. Before default a creditor, whose debt was properly chargeable to the expense account, attached tolls belonging to the road. The Supreme Court of Tennessee held that inasmuch as the creditor had attached the tolls before they came to the hands of the trustees, and before any default had occurred in the payment of the bonds or interest, and while the road remained in the hands of the company, he acquired a lien superior to that of the mortgage.[1] The receipts of the road were not regarded as coming under the mortgage lien until the net profits had been ascertained. "This, we think, is the plain meaning of the stipulations of the deed. To construe the deed as intending to fasten the lien of the mortgage on the gross earnings, would result in depriving the company of appropriating them to the current expenses of the road, and effecting the objects and purposes of the deed itself. The mortgagees look to the net earnings of the road for the payment of their interest and their bonds. They agree that the company shall operate the road, in order that net profits may be produced. To enable them to do this, they leave in the hands of the company the gross earnings, to be used in meeting current expenses and debts."

So long as mortgage trustees or the bondholders omit to take possession of the mortgaged property after a default, they cannot complain that the income of the road is applied to completing and operating the road, and to the payment of floating debts.[2]

118. **Money in the hands of the treasurer of a railroad company at the time possession is taken,** under a mortgage covering its property and earnings, belongs to the corporation and not to the trustees, in case the mortgage provides that until default the company may retain possession; and if the trustees take possession of this money, inasmuch as it is not subject to the lien of the mortgage, it is subject to garnishment at the suit of judgment creditors of the company. The mortgage of the St. Paul and Pacific Railroad Company covered the road and franchises, and "the tolls, incomes, rents, issues, and profits." It provided that until default in payment of the principal and interest of the bonds secured, the company was to operate the road and use the rents and profits as if the mortgages had not been made; but that in

[1] Clay *v.* East Tennessee & Va. R. R. Co. 6 Heisk. (Tenn.) 421.

[2] Williamson *v.* New Albany, &c. R. R. Co. 1 Biss. 198.

case of default, the trustees might enter into possession, collect and receive all tolls and freights, and operate the road for the benefit of the bondholders. When the trustees under the mortgage took possession of the road, they also took possession of a considerable sum of money then in the treasurer's hands; and soon afterwards were summoned in a garnishee process by judgment creditors of the company, who claimed that the funds were subject to their judgment debt. This money or debt, said the court, was the subject of garnishment, unless the trustees had the right to take and hold it by virtue of some lien created by the mortgagees. Whenever, by the terms of a mortgage upon this kind of property, either expressly or by implication, the right is reserved to a company mortgagor, who is the general owner, to retain the possession and use of the mortgaged property, by operating the road, receiving the earnings, and applying them in its discretion towards defraying the operating expenses, such mortgagor must be regarded as the owner of all such earnings acquired by the continuance of its possession, and as invested with the absolute right of disposal as fully as any general owner of property enjoys. This right is wholly inconsistent with the exercise of any specific lien under the mortgage in favor of the mortgage trustees.[1]

A similar decision has been made by the Supreme Court of Tennessee, which in a recent case held that under a mortgage, covering the income of a railroad, the earnings of the road in the hands of the treasurer are not subject to attachment when this is made subsequently to the registration of the trust deed.[2]

Money in the hands of a station agent of a railroad company, received for tickets sold and freight collected, cannot be attached in his hands by trustee process in a suit against the company by a creditor. Such an agent is considered as the corporation itself in such business. There may be a limit to the application of this principle. There may be an agent of such a corporation who is not invested with its personalty. But all regular agents doing the business for which the corporation was organized must be considered as identical with the corporation, and their possession

[1] De Graff *v.* St. Paul & Pacific R. R. Co. in Supreme Court of Minn. April, 1878; 5 Reporter, 561; and see Merchants' Bank *v.* Petersburg R. R. 24 Pittsburg L. J. 192; 5 Cent. L. J. 74; Sprague *v.* Steam Navigat. Co. 52 Me. 592.

[2] Buck *v.* Memphis & Little Rock R. R. Co. March T. 1877, 4 C. L. J. 430.

as the possession of the company.[1] Therefore they cannot be held as its trustees.

Funds in the hands of the treasurer of a railroad company at the time of its making a trust mortgage of all its property, and embraced in the mortgage, cannot be held by creditors by means of a trustee process, although the mortgage trustees have permitted the company to use and manage the road and its other property.[2]

119. A mortgage of the tolls and income of a railroad has, however, been enforced against the mortgagor for the income received by him while in possession, under a mortgage quite similar in terms to those already mentioned.[3] In 1848 the legislature of Indiana chartered a company to make a railroad from Richmond to New Castle in that state, a distance of twenty-seven miles. In 1851 the charter was amended so as to enable the company to extend its road, and to borrow money on a mortgage of its "road, income, and other property." In 1852 the company issued its bonds to the amount of $300,000, payable in fifteen years, and secured them by a mortgage of "all the present and future to be acquired property of the said The New Castle and Richmond Railway Company; that is to say, the first section of their road from Richmond to New Castle as aforesaid, with the superstructure, and all rails and other materials used therein, and all rights therein, tolls, and income, and any rights thereto or interest therein, together with the tolls or income to be had or levied therefrom, and all franchises, rights, and privileges of the said The New Castle and Richmond Railroad Company of, in, to, or concerning the same."[4] The mortgage provided that the trustees named in the deed, upon default of the company to pay either interest or principal of the bonds, might enter and take possession of the mortgaged property, and use the same, and

[1] Pettingill *v.* Androscoggin R. R. Co. 51 Me. 370; Fowler *v.* Pittsburgh, Fort Wayne & Chicago R. R. Co. 35 Pa. St. 22.

[2] Woodman *v.* York & Cumberland R. R. Co. 45 Me. 207; and see Noyes *v.* Rich, 52 Me. 115.

[3] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 5 Biss. 237. See, also, *S. C.* 4 Ib. 35, and Bill *v.* New Albany, &c. Ry. Co. 2 Ib. 390. From the facts of the case as they appear in these reports, it seems that the decision is not in accordance with general principles or general authorities.

[4] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35. "Such is the verbose language of the deed," per McDonald, J.

apply the proceeds of such use to the payment of the principal and interest of the bonds; and that, if it should become necessary, the trustees might sell the mortgaged property at auction, and apply the proceeds to the payment of the principal and interest. Other mortgages were afterwards made of the whole line of road from Logansport to Richmond, a distance of one hundred and eight miles; and under one of these mortgages the property was sold, subject to the above mortgage, and was purchased by the Cincinnati and Chicago Air Line Railroad Company, which took possession of the road on the first day of July, 1860. In 1864 a bill was filed in the Circuit Court of the United States to foreclose the mortgage of 1852, upon which neither principal nor interest had been paid. Litigation upon this bill was continued until 1873, when the case was finally disposed of.[1] During this long period much had occurred in the progress of the case; many orders had been made by the court; and, among others, an interlocutory decree by Mr. Justice Davis in 1869, which found that the mortgage of 1852 covered the railroad and its revenues between Richmond and New Castle, but not the road or income of any other part of the road; and that it covered a ratable portion of the rolling stock, or one fourth part of it, that being the relative length of this portion of the road to the length of the whole line of road.

One of the principal questions to be determined upon final hearing was whether the mortgage covered the income which had in the mean time been secured from this section of the road. The interlocutory order of Judge Davis declared the plaintiff entitled to the income from the date of the filing of the bill in 1864. It does not appear why that date was fixed upon, unless it was considered that the filing of the bill was a demand for the earnings. In 1872, however, the master was authorized to take an account of the earnings of the road from the first day of July, 1860, when the defendant company took possession of the road; and he found that from that date up to the beginning of the suit the income amounted to $95,344.08, and the questions of the right to the income and of the time for which it should be taken became of importance. The court held that the mortgagee was entitled to the income from the time the defendant took possession of the road; that notwithstanding the general rule that the mortgagor, until

[1] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 5 Biss. 287.

some action by the mortgagee, is entitled to the earnings and profits of the mortgaged property, it is competent for the parties to agree in the mortgage that such earnings and profits shall be subject to the lien, and that under such agreement the income, when received, is held by the party receiving it in trust for the mortgagee. It was claimed by the defence that the defendant company would certainly not be chargeable with any income after it had offered in open court to deliver up and surrender to the plaintiff the property covered by the mortgage. To this the court replied, that the mortgage took effect upon the income, when earned; and as long as the mortgagor or its assignee operated the road and earned income, the responsibility growing out of these facts could not be avoided. The court further suggested, but did not decide, that although the mortgage in this case covered only the section between Richmond and New Castle, as it included the income of this section, and the company in possession operated the whole road as an entirety and kept no separate accounts of that section, its whole property and interest in the road might be equitably bound for any decree for such income that might be rendered against it.

In Iowa it has also been held that it is competent for a railroad company to mortgage its future net earnings, although the road be not *in esse* at the time of the execution of the mortgage; and when such earnings have accrued a creditor cannot intercept them in the hands of the servants of the company.[1]

The Mississippi and Missouri River Railroad Company, incorporated under the laws of Iowa, executed a mortgage of its road and property, together with "all the tolls, incomes, issues, and profits to be had from the same." The mortgage provided that "all of the rights of the bondholders or trustees are subject to the possession, control, and management of the directors of said company until default." The earnings of the road subsequently proved insufficient to pay the ordinary operating expenses and the interest on the bonds. A judgment creditor of the company attempted to reach and apply to the payment of his demand credits of the company for freight and other earnings in the hands of several persons. The Supreme Court of Iowa held, however, that the revenues of the company were not subject to attachment or execution, and that a creditor attempting so to apply them

[1] Jessup *v.* Bridge, 11 Iowa, 572; Dunham *v.* Isett, 15 Iowa, 284.

might properly be restrained by injunction on application to a court of equity.[1] This case contains no discussion of the question, and the authority cited, *Galena & Chicago R. R. Co.* v. *Menzies*,[2] is not applicable, because the moneys sought to be held in that case were earned after the mortgagees took possession of the road.

120. In estimating the earnings of a section of a road covered by a mortgage, the master may make a pro rata estimate of the earnings and expenses of the whole road, when such section has not been operated separately, but as a part of the whole road, and no separate accounts have been kept of that part. Under such circumstances the master could not probably adopt any other rule, and although the result is not an accurate one, it is the best that could be reached. A railroad company, after neglecting to keep separate accounts for such section, cannot be heard to complain of the adoption of this rule.[3]

[1] Dunham *v.* Isett, 15 Iowa, 284.

[2] 26 Ill. 121.

[3] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 5 Biss. 237. See this case for methods of estimating the net earnings of a section of a road, the rental value of rolling stock, and the like.

CHAPTER IV.

MORTGAGES OF AFTER-ACQUIRED PROPERTY.

I. Principles upon which after-acquired property may be charged, 121–127.
II. What terms are sufficient to include after-acquired property, 128–141.
III. Mortgages attach to after-acquired property subject to lien upon it when acquired, 142–145.

I. *Principles upon which after-acquired Property may be charged.*

121. After-acquired property at law. — "It is a common learning in the law," says Perkins,[1] "that a man cannot grant or charge that which he hath not." *Qui non habet, ille non dat.* Yet even at law this rule is not without some qualifications. Many instances of accessions and increase of property passing with a grant are given in the old books. Then, coming to the doctrine of fixtures, there is no doubt entertained as to the proposition, that at law a mortgage of land will pass all structures and things attached to it in the nature of fixtures that may be placed upon it by the mortgagor. But according to the doctrine of some cases, it is not necessary to maintain that the rolling stock and equipments of a railroad are parts of its accretions and fixtures, so as to make the transfer good at law. Such a mortgage, whether good at law or not, is held good in equity.

At law, an agreement to create a lien, either upon property in possession at the time or upon that which may be acquired afterwards, must have reference to specific property, which must be definitely and intelligibly pointed out. But this description may be made in general terms. A mortgage of all lands which the mortgagor might afterwards acquire would create no specific lien upon any land; but would be merely an executory contract binding upon the mortgagor personally.[2]

122. In equity it is common learning that a covenant for a val-

[1] A Profitable Book, tit. Grants, § 65.

[2] See Winslow *v.* Merchants' Ins. Co. 4 Met. (Mass.) 306, 316, per Shaw, C. J.

uable consideration to convey particular lands is deemed a specific lien upon those lands, which will be enforced against the covenantor and all persons claiming under him, except purchasers for value, without notice of such covenant.[1] Equity considers that done which one has distinctly agreed to do, and is in conscience bound to do. Equity, therefore, treats a mortgage of things not *in esse* as a contract which attaches itself to the things when they come into being, and enforces it. Upon the principle, that upon every acquisition of property within the description contained in the mortgage a chancellor would decree the mortgagor to execute a mortgage of such subject, it will be considered as though it had been done, and that of every article of property as acquired, there was an actual mortgage then executed.[2] That a contract by way of mortgage intended by the parties to create a positive lien or charge either upon real or personal property, whether owned by the mortgagor or not, or, if personal property, whether it is then in being or not, attaches in equity as a lien or charge upon the particular property as soon as the mortgagor acquires title thereto, is a proposition that is almost universally supported by recent authorities, both English and American.[3] A conveyance of what does not exist does not operate as a present transfer in equity any more than it does at law. The difference is merely that at law the conveyance, having nothing to operate upon, is void; while in equity what is in form a conveyance operates, by way of present contract, to take effect and attach to the subject of it as soon as it comes into being; the agreement to convey then ripens into an actual transfer.[4]

A mortgage of after-acquired property, being a specific lien, and good in equity, is preferred to a subsequent legal lien by judgment or mortgage.[5]

[1] Fonblanque, b. 1, ch. 5, § 8; Fremoult *v.* Dedire, 1 P. Wms. 429.

[2] Per Mr. Justice Sharswood, Philadelphia, Wil. & Balt. R. R. Co. *v.* Woelpper, 64 Pa. St. 366; Covey *v.* Pittsburg, Fort Wayne & Chicago R. R. Co. 3 Phila. (Pa.) 173, per Agnew, P. J.

[3] Holroyd *v.* Marshall, 10 H. L. 191; Pennock *v.* Coe, 23 How. 117; Mitchell *v.* Winslow, 2 Story, 630, 644; Brett *v.* Carter, 2 Lowell, 458; Barnard *v.* Norwich & Worcester R. R. Co., C. C. for Dist. of Mass. 1876, 14 Nl. Bank Reg. 469; Dillon *v.* Barnard, 1 Holmes, 386, 394; Williamson *v.* N. J. Southern R. R. Co. 29 N. J. Eq. 311; *S. C.* 15 Am. Railw. R. 572; Butler *v.* Rahm, 46 Md. 541; Cook *v.* Corthell, 11 R. I. 482, dissenting opinion; Morrill *v.* Noyes, 56 Me. 458.

[4] Emerson *v.* European & N. A. Ry. Co. 67 Me. 387.

[5] Stevens *v.* Watson, 4 Abb. (N. Y.) App. Dec. 302; and see Dwight *v.* Newell, 3 N. Y. 185.

In Louisiana, a mortgage does not extend to property acquired after the date of it.[1] The Civil Code provides that future property cannot be the subject of a conventional mortgage.[2]

123. A railroad company having authority to mortgage its corporate property and franchise may include in the mortgage after-acquired property,[3] without exceeding the limits of its power. "To build a railroad requires a vast capital beyond ordinary means, and to borrow it, 'to carry into effect the objects of the corporation,' demands all the security within the possible power of the corporation to give. By necessity and practice, the money of the creditor capitalist finishes and equips the road; and slender indeed would his security be which extends not beyond the worn-out rails and rolling stock and equipment first in use, and these, indeed, not often in being at the time of the execution of the mortgage. In giving the power to borrow and pledge, it must be supposed the power was given to its fullest extent in order to carry into effect the objects of the incorporation."[4]

A company empowered to borrow money on the security of its property and income is authorized to mortgage every species of property necessary to the operating of the road, whether then owned by it or afterwards acquired.[5]

The Philadelphia and Baltimore Central Railroad Company, in pursuance of authority given by charter, executed a mortgage to trustees of all their corporate property and franchises then held or thereafter to be acquired, to secure their bonds, not exceeding $1,500,000 in amount. The mortgage also provided a mode by which the whole mortgaged property might be sold together by the trustees, at the request of bondholders, to the amount of $100,000. The Philadelphia, Wilmington, and Baltimore Railroad Company, in a suit upon bonds secured by this mortgage, recovered judgment for $122,942.11 against the mortgagors; and an execution was issued which was levied upon four locomotive engines, a number of cars, shop and quarry tools, cross-ties, iron rails, and furniture at stations. Woelpper was the holder

[1] State *v.* New Orleans & Nashville R. R. Co. 4 Rob. (La.) 231; State *v.* Mexican Gulf Ry. Co. 3 Ib. 513.

[2] Rev. Code 1870, art. 3308.

[3] Dunham *v.* Cincinnati, Peru, &c. Ry. Co. 1 Wall. 254.

[4] Per Agnew, P. J., in Covey *v.* Pittsburg, Fort Wayne & Chicago R. R. Co. 3 Phila. (Pa.) 173.

[5] Ludlow *v.* Hurd, 1 Dis. (Ohio) 552; Coopers *v.* Wolf, 15 Ohio St. 523.

of bonds, secured by the mortgage, amounting to $7,200. He brought a bill in equity against the mortgagor and the judgment creditor, joining also the trustees under the mortgage, praying a decree, that the property levied upon was a part of the mortgaged premises, and as such exempt from levy and sale under execution; and also that the judgment creditors be restrained from further levying the execution. The Philadelphia, Wilmington, and Baltimore Railroad Company contended that the property levied on was not covered by the mortgage, because it was acquired after the delivery of the mortgage; but the court held otherwise, and perpetually enjoined them from levying the execution.[1]

Authority given to a railway company, by statute or charter, to mortgage "all, or any part of the road, property, rights, liberties, and franchises of said company," gives the company the right to include in the mortgage all future accessions of the road.[2] "Property," says Mr. Justice Sharswood, delivering the opinion of the Supreme Court of Pennsylvania in this case, "is whatever is a man's own. His future acquisitions, though subject to a contingency, are his own; and if, as we have seen, they can be granted or assigned, they are his present property, valuable now to him, because they can be enjoyed or used by anticipation. There is no refinement in this reasoning, as applied to the construction of this statute. The legislature evidently intended it. Every law is to be interpreted according to its subject matter. This act relates to a railroad and its usual necessary appurtenances. The words are 'road, property, rights, liberties, and franchises,' including the road and all its adjuncts. The very objects of the loan, and of the mortgage to secure it, as expressed in the act, was 'for the purpose of constructing and equipping the road.' It evidently contemplated a condition of things in the future. The bare road, only then constructed in part, without any rolling stock or equipments, would have been no security, or a very inadequate one. Had the road even been fully equipped at the date of the mortgage, can it be doubted that the legislature meant that it should comprise everything subsequently acquired, to replace old and worn-out materials, and to maintain and keep up the equipment? No money would have been loaned on a security daily deterio-

[1] Philadelphia, Wil. & Balt. R. R. Co. *v.* Woelpper, 64 Pa. St. 366.

[2] Philadelphia, Wil. & Balt. R. R. Co. *v.* Woelpper, *supra*.

rating, and which must eventually perish entirely." The learned judge quotes with approval the remarks of Mr. Justice Agnew, already given above.

124. A railroad with its franchises has sometimes been regarded as one entire thing, a unity constituting one indivisible whole, so that a mortgage of it must necessarily embrace all property of every description essential for the use of the road; and must necessarily attach to all property subsequently acquired for its use, as an incident to the principal thing, although there be no language in the deed applicable in terms to such property.[1]

This doctrine, that the mortgage of a railroad as an entire thing covers parts of the thing which have been acquired or constructed after its execution, so far as it relates to such after-acquired property as actually becomes a part of the original thing mortgaged, rests upon the doctrine of accession, which prevails in ordinary mortgages where improvements are made upon real estate mortgaged which becomes a part of the realty, or where repairs are made on an article of personal property.[2]

The right of a railroad corporation to mortgage its after-acquired property is implied from any authority given it to mortgage its rights, franchises, and property as an entire thing; for, to be effectual, the mortgage must embrace all such future acquisitions of the corporation as are proper accessories to the thing pledged and essential to its enjoyment. In short, the power to mortgage after-acquired property is implied in the power to make any mortgage at all.[3] "Whatever is added to the original structure becomes a part of it, and cannot be severed from it; and if the security by the mortgage is to continue to be of any value during the period that must transpire before the bonds become due, it must depend upon the implied covenant of the company to keep it in running order, and thus earn the necessary sums to discharge the accruing interest, and, eventually, indemnify the creditors for the principal debt."[4]

[1] Dinsmore *v.* Racine & Miss. R. R. Co. 12 Wis. 649, 656.

[2] Farmers' Loan & Trust Co. *v.* Commercial Bank, 11 Wis. 207, 212, per Paine, J.

[3] Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431. See Pennock *v.* Coe, 23 How. 117; Shaw *v.* Bill, 95 U. S. 10, 16.

[4] Ludlow *v.* Hurd, 1 Dis. (Ohio) 552, per Storer, J.

125. This doctrine rests upon the authority of a few cases, of which *Pierce* v. *Emery*[1] is perhaps the most important. The Portsmouth and Concord Railroad was authorized by the legislature of New Hampshire to issue bonds for a loan of money, and, for security, to make a mortgage to trustees of all the property, and all the rights, franchises, powers, and privileges of the corporation, and in the mortgage to give the trustees power, on breach of the condition, to sell the real and personal estate, and all the rights, franchises, powers, and privileges named in the mortgage, by a deed which should convey to the purchasers all the rights, franchises, powers, and privileges which the corporation possessed, and the use of the railroad, with all its property and rights of property, for the same purposes and to the same extent that the corporation could use the same if the deeds had not been made, subject to the same liability as to the use of the road that the corporation would have been under if the deed had not been made. The corporation issued bonds and made a mortgage under this authority, which conveyed the road and all its franchises and all the personal property of the company as it was then used, and as the same might thereafter be changed or renewed. After the making of the mortgage the company purchased a cargo of iron rails, and it being subject to a lien of the United States for duties, an agreement was made with certain parties that they should pay the duties and that the railroad might lay the iron on their track; but that the parties advancing the money might take up the iron and hold it for security for the money advanced, provided the company did not repay them within a specified time the money advanced. The court held that when this agreement was made the iron was already subject to the prior mortgage, and that all that the company could convey or deal with was an equity of redemption subject to that mortgage; that the iron having passed according to this bargain into the possession of the road, that the lien for the duties was gone and could not be asserted as against the mortgage.

As to the effect of this mortgage, the court regarded it as in substance a conveyance, under legislative authority, of the road and corporation, as an entire thing, and that subsequently acquired property became a part of it as an incident and accession.

[1] 32 N. H. 484. See, however, Boston, Concord & Montreal R. R. Co. *v.* Gilmore, 37 N. H. 410, and § 168.

Upon a sale of the property under the mortgage, all the rights and franchises of the corporation and the use of the road would be transferred to the purchasers, who would hold them subject to the same liabilities by which the corporation was bound before the sale. "It is not easy to see how the original corporation, in the hands of the former corporators, could, after such a sale, have any practical or even legal and theoretical existence. They could hold no property; they could maintain no action, nor elect any corporate officer; these powers are all rights and franchises of the corporation, created and granted by the act of incorporation, and are all transferred and conveyed by the deed of the trustees to the purchasers under their sale. In some cases, after the franchises of a corporation are lost by forfeiture, the corporation is still held to exist in contemplation of law, so far as to be capable of being revived by a regrant from the government. But here the franchises would not be forfeited to the state, but transferred to the purchasers; and the state could not revive the old corporation by a regrant of the franchises which had become vested in the purchasers. The sale would in substance transfer the road and the corporation to the purchasers." [1]

126. **The doctrine is not generally supported that after-acquired property of a railroad company passes,** as incident to the franchise to acquire property, by a mortgage of the franchises and property of the company executed by lawful authority. This view was strongly urged upon the court in the case of *Dinsmore* v. *Racine & Mississippi Railroad Company*; [2] but the court, after examining the grounds of the doctrine and some of the cases supporting it, declined to adopt it, and stated the objections to it. It is true that at that time there was no statute in force in Wisconsin authorizing a railroad company to mortgage its franchises, and it is admitted that a corporation would have no power to make a mortgage by which property after acquired would pass as incident to the franchise to acquire property, except by virtue of express legislative authority to convey the franchises of the corporation. None of the cases which support this doctrine do so upon the general principle that a railroad, with its franchises and property, is an indivisible, entire thing, except as it be-

[1] Per Chief Justice Perley, delivering the opinion of the court.

[2] 12 Wis. 649.

comes so by virtue of some special or general legislative authority.[1] On general principles of law, a railroad corporation, with its franchises and property, though undoubtedly having many things peculiar to itself, cannot be regarded as one entire and indivisible thing. It cannot be likened to a machine, or to a vessel. If a mortgage, which does not in terms include after-acquired property, can be held to embrace property which is personal in its nature, and is not attached to the realty as fixtures, without a special statute manifesting an intention on the part of the legislature that such mortgage should pass the entire franchises and property of the company, and without any general law giving to a mortgage made by a railroad company greater effect than is given to a mortgage by a natural person, a revolution would be worked in the registry laws. This objection is forcibly stated by Mr. Justice Cole, of the Supreme Court of Wisconsin:[2] "If the mortgage of the Farmers' Loan and Trust Company became a prior lien upon the timber lands mentioned in this case, by virtue of the doctrine of entirety, there could be no safety in depending upon the record. For a person going to buy these lands of the railroad company would find nothing upon the record to apprise him that they had been mortgaged to that company. If he looked into that mortgage, he would find nothing in the description of the mortgaged premises which related to them. Finding the title of record in the railroad company unincumbered, so far as he could see, he might buy or take a mortgage upon the lands, trusting to the registry law. Thinking that the same legal consequences attached to a mortgage given by a railroad company as would attach to one given by a natural person, he would find that the record was but a snare. But still, if this is the settled law of the land in reference to railroads and railroad property, such a person could only complain of his ignorance and folly. This mortgage given the Farmers' Loan and Trust Company was made by virtue of the general power of the railroad company to dispose of its property, and not under any law of the state authorizing such corporations to mortgage their rights and franchises. If the mortgage had been made by an individual, within the de-

[1] See Pierce *v.* Emery, 32 N. H. 484; Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431; Willink *v.* Morris Canal & Banking Co. 3 Green (N. J.) Ch. 377.

[2] In Dinsmore *v.* Racine & Miss. R. R. Co. *supra.*

cisions of this court, it would not have bound his subsequently acquired property. If the mortgage in this case embraced in its terms these timber lands, we might have to consider whether it did not fall within the principle of our decisions upon that subject; but it does not. The mortgage of the Farmers' Loan and Trust Company can only hold these lands by virtue of this doctrine of entirety. We have endeavored to show that in reason, and from the nature of railroad property, there is no ground for saying that a railroad, with all its rights, franchises, and property, real and personal, is an indivisible, entire thing. Practically, we believe, they are not so regarded. Mortgages are given upon the personal property of railroads, or upon some portion of it, or upon some portion of the real estate, or a portion of the road. The property has been treated as though it might be separated, and appropriated to the payment of debts, without destroying the integrity of the company."

127. **This doctrine cannot be applied where several mortgages are given on separate divisions** of the road. The doctrine is based upon the ground that the property acquired after the making of a mortgage of the property and franchises of a railroad company passes as an incident to the franchise to acquire property. Such a mortgage, when duly authorized, is moreover regarded as a conveyance of the property and franchises of the company as an entire thing. A division of the franchise by a mortgage of a part of the road is impracticable.[1]

II. *What Terms are sufficient to include after-acquired Property.*

128. **The word "undertaking" may have the effect,** whether by itself or in connection with other words, to create not only a charge upon the property itself of the corporation, as distinguished from its income merely, but also a charge upon after-acquired property. The circumstances of the case have much to do in determining the effect of the word. Thus, a steamship company having power to issue mortgages, bonds, or debentures, issued mortgage debentures, charging "the undertaking, and all sums of money arising therefrom," with the repayment of the loan. Before the maturity of these obligations, the company was wound up, and the ships and other property of the company were sold.

[1] Farmers' Loan & Trust Co. *v.* Commercial Bank, 11 Wis. 207.

The court held that the debentures were a charge upon the property of the company, both that which existed at the time, and that which was afterwards acquired ;[1] Giffard, L. J., saying : " I have no hesitation in saying that, in this particular case, and having regard to the state of this particular company, the word ' undertaking ' had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company. And I take the object and meaning of the debenture to be this, that the word ' undertaking ' necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval ; and, furthermore, that during that interval the debenture holder would not be entitled to any account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business."

129. **A railroad company having the right by its charter to construct a branch road,** although not laid out at the time of the original location of the road, and not then contemplated, and although not laid out or perfected at the time of a mortgage of all the lands which might afterwards be acquired for the use of the road, such branch road and the land acquired for it, and for purposes connected with the use of the branch road, pass to the mortgagee. Such branch road might, under some circumstances, be regarded as a legitimate incident of the main road, and as necessary for its use as are side tracks, shops, and engine-houses.[2] If, however, the building of the branch road was not authorized at the time of making the mortgage, but was authorized by a subsequent charter giving other persons as well as the railroad company the right to become stockholders, the mortgage will not operate upon such branch road.[3]

130. **When a railroad company has the right to change its location,** land acquired for its new location will be embraced in a

[1] Panama, New Zealand & Australian Royal Mail Co. *in re*, L. R. 5 Ch. 318–322 ; *S. C.* 4 Cox's Joint Stock Cas. 35.

[2] Seymour *v.* Canandaigua & Niagara Falls R. R. Co. 25 Barb. (N. Y.) 284.

[3] Meyer *v.* Johnston, 53 Ala. 237, 331.

mortgage previously made of all lands which it might afterwards acquire for the purposes of the road. Such land is sufficiently defined by reference to the charter of the road which confers a privilege of changing its location within certain limits.[1] To hold that by deviating from the route laid down the road could be, *pro tanto*, freed from the lien, would be not only a violation of the terms of a mortgage covering all property to be acquired, but would be a very dangerous doctrine, and one contrary to public policy, which is, to encourage the construction of necessary public works.[2] The lien of a mortgage previously executed is not impaired by any deviation in the route so long as this is kept within the general plan and direction authorized by the charter of the road.[3] If a company, after partially building a portion of its road, abandons it for another route on which the road is actually built, the lien of the mortgage will cover the latter location, but not the former, over which the company had only a right of way; for that, in consequence of the abandonment, reverts to the owners of the soil.[4]

A mortgage by a railway company of its road constructed and to be constructed, and of all lands owned by it, or which it might afterwards acquire for the purposes of its road, takes effect as a specific lien upon such lands as soon as they are acquired. The description of the land is made intelligible and definite by reference to the charter of the road, which defines the land the company may take.[5] It is immaterial whether the road has been definitely located at the time of the mortgage; when it is located, the lands acquired within the line of its location and for the use of the road so located will be embraced in the mortgage.

131. The operation of a mortgage in respect to future-acquired property may of course be limited to such property as might be purchased with the money obtained from the mortgage loan. Such was claimed to be the effect of certain mortgages of the New Albany and Salem Railroad Company, incorporated under the laws of Indiana. The mortgage covered all the present and future to be acquired property pertaining to the road; "that

[1] Seymour *v.* Canandaigua & Niagara Falls R. R. Co. 25 Barb. (N. Y.) 284.

[2] Elwell *v.* Grand St. & Newtown R. R. Co. 67 Barb. (N. Y.) 83.

[3] Meyer *v.* Johnston, 53 Ala. 237, 330.

[4] Meyer *v.* Johnston, *supra*.

[5] Seymour *v.* Canandaigua & Niagara Falls R. R. Co. 25 Barb. (N. Y.) 284.

is to say, their road, made and to be made, including the right of way and land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials used therein, or procured therefor, inclusive of the iron rails purchased, or to be purchased or paid for with the above-described bonds, or the money obtained therefor, and the machinery purchased with the same; bridges, viaducts, culverts, fences, depot grounds and buildings thereon, engines, tenders, cars, tools, materials, machinery, and all other personal property, right thereto, or interest therein, pertaining as aforesaid, together with the tolls, rents, or income to be had or levied therefrom, and all franchises, rights, and privileges of the said parties of the first part of, in, to, or concerning the same." The Supreme Court of the United States,[1] however, decided that the terms of the mortgage were broad enough to cover all property pertaining to the road, not only that existing at the date of the mortgage, but also such as was afterwards substituted for property then existing, or was subsequently added by the company, and was in existence at the time of the foreclosure. The reference made in the description to the property which might afterwards be purchased with the bonds issued was declared not to operate as a limitation of the lien of the mortgage to such after-acquired property, but only to remove any doubt that might otherwise possibly arise, whether the property thus purchased would also go to increase the security offered. It was not deemed of any moment whether the rolling stock and machinery in use by the company at the date of the decree were acquired with the proceeds of the bonds or with the subsequent earnings of the company.

132. **After-acquired land, not within the terms of a mortgage,** is not covered by it. A mortgage of a road and its appurtenances, the land on which it is constructed, and which it may acquire for stations, engine houses, shops, and other structures, or upon which embankments, drains, and fences might be built, does not create any lien upon a tract of woodland afterwards acquired by the company, situate seven miles from the road, although such land was purchased and used by the company for the purpose of supplying the road with timber and wood. The mortgage in terms relates to land along the line of the road, in im-

[1] Shaw *v.* Bill, 95 U. S. 10.

mediate connection with it, and necessary for the operation of it; and it contains no apt and proper language to embrace land remote from the road and which cannot be used for any of the specific purposes mentioned.[1]

A mortgage by a railway company of its "road, ... whether made or to be made, acquired or to be acquired, and all its property, real and personal, whether now owned or hereafter to be acquired, used, or appropriated for the operating or maintaining the said road," is by its terms restricted to property so used or appropriated.[2] Lands acquired by the company, and not thus used or employed for the purposes of the road, would not come within the description of the mortgage.[3]

133. **After-acquired personalty not within the terms of the mortgage.** — A mortgage conveying a "railroad, with its superstructure, track, and all other appurtenances, made or to be made," and also the "railroad furniture, including engines, tenders, cars of every description, tools, materials, machinery, and every other kind of personal property which shall be used for operating said railroad," does not purport to grant property thereafter to be acquired by the company, except so far as it becomes appurtenant to the road, or is used in it. Chairs intended for fastening down the rails afterwards acquired, which were never used in its construction, but were lying upon the ground in heaps, are not appurtenant to the road or used in operating it within the terms of the mortgage, and consequently are not covered by it. There is no language in the instrument which purports to convey materials to be thereafter acquired for the construction or repair of the road.[4]

Upon a second trial of this case additional evidence was introduced to show that the intention of the parties was to grant everything that the company then owned or might afterwards acquire; and it was claimed that the intention of the parties should be arrived at, as well from consideration of their situation and the general nature and object of railroad mortgages, as from the words in the instrument. "But it must be borne in mind," say the

[1] Dinsmore *v.* Racine & Miss. R. R. Co. 12 Wis. 649.

[2] Walsh *v.* Barton, 24 Ohio St. 28.

[3] Seymour *v.* Canandaigua & Niagara Falls R. R. Co. 25 Barb. (N. Y.) 284.

[4] Farmers' Loan & Trust Co. *v.* Commercial Bank, 11 Wis. 207; affirmed in Dinsmore *v.* Racine & Miss. R. R. Co. 12 Wis. 649; Farmers' Loan & Trust Co. *v.* Cary, 13 Wis. 110; Farmers' Loan & Trust Co. *v.* Commercial Bank of Racine, 15 Wis. 424.

court,[1] "that it is not the business of construction to look outside of the instrument to get at the intention of the parties, and then carry out that intention, whether the instrument contains language sufficient to express it or not; but the sole duty of construction is, to find out what was meant by the language of the instrument. And this language must be sufficient, when looked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument. And we can see nothing in the additional evidence now before us which we think ought to change the effect before given to the mortgages under which the appellant claims."

Upon this principle, a mortgage of the Vermont Central Railroad Company of its road and appurtenances, together with "all other personal property belonging to said company, as the same now is in use by said company, or as the same may be hereafter changed or renewed by said company," was held not to embrace certain machinery for "burnetizing" ties and timber so as to render them more durable, which machinery was not in existence at the time of the mortgage, and took the place of nothing that was therein specified. Neither is such machinery any part of the necessary furniture or equipment of the road; and therefore although such a mortgage might cover new engines, or cars, or the like, procured to replace such as had been worn out, it could not be extended so as to embrace property not used upon the road, and in no sense a part of it.[2]

134. A land grant which the corporation has no power to accept. — But the authority of a railroad company to bind its future acquisitions by mortgage is held to be limited to such acquisitions as it then has the power by charter or by general law to make. Upon this ground it was held that a mortgage by the Alabama and Tennessee River Railroad Company did not cover a grant of lands subsequently made by the United States, which the company was by special act empowered to accept, because it had no power to accept such a grant when the mortgage was given, and the acquisition of such a land grant was not then contemplated. Although the mortgage in terms covered the road and the corporate franchises, together with "all other property now

[1] Farmers' Loan & Trust Co. *v.* Commercial Bank of Racine, 15 Wis. 424, 438.

[2] Brainerd *v.* Peck, 34 Vt. 496.

owned and which may be hereafter owned by the railroad company," its operation was restricted to such property as the company then had power to receive and hold.[1]

135. In a mortgage of a land grant not yet earned, an element of uncertainty may be introduced by including only a portion of the grant without particularly describing that portion. Thus where a railroad company, which, upon completing its road according to certain conditions, would become entitled to receive sixteen sections of land of six hundred and forty acres each for each mile of road, included in a mortgage only twelve sections per mile, amounting to thirteen hundred and twenty sections, reserving four sections per mile, or four hundred and forty sections in all, in constructing their road, and afterwards transferred to a contractor four hundred and seventy-two sections, who received the certificates in good faith without any knowledge of their being mortgaged or pledged in any manner, it was held that he acquired a good title to these sections, free from the incumbrance of the mortgage.[2] For the mortgage bondholders it was contended that the land grant, to the extent of thirteen hundred and twenty sections, became a lien upon this number of sections as soon as the company received them from the state; and that if there was any difficulty in finding the balance the contractor must meet it; and therefore they demanded that the contractor should surrender all the certificates held by him, or, at all events, that the land should be subject to sale under the decree, until the number of thirteen hundred and twenty sections had been made good. Their claim, however, was not by absolute grant or assignment, but through the effect of the trust deed operating by way of estoppel; for at the time the deed was executed the company had not received the grant nor earned it by the building of the road. The deed amounted to a covenant on the part of the company that the certificates for the land should be included in the mortgage when they should come into existence. "This is the doctrine in equity," said Mr. Justice Bradley, delivering the opinion of the United States Circuit Court. "To this the court holds the company, and as against it and its assignee, having notice of the contract, they treat the certificates as

[1] Meyer *v.* Johnston, 53 Ala. 237, 331.

[2] Campbell *v.* Texas & New Orleans R. R. Co. 2 Woods, 263.

if they had been in existence, and had been embraced in the trust deeds when they were executed. But the courts will not override other equities in coming to this result. If parties purchased the certificates in good faith, and without notice of any such estoppel, it would be doing injustice to them to deprive them of the certificates so purchased. In the case before us there was a margin of four sections per mile, over and above the amount or number of sections pledged to the bondholders, which the company itself had a perfect right to dispose of. It would be naturally supposed by parties dealing with the company, even if they knew of the existence of the trust deeds, that so long as the company kept within the line of this margin in issuing additional certificates, no interference was made with those to which the trustees under the trust deeds were entitled. If a man sells me fifty bushels from a lot of one hundred bushels of corn, and a third person afterwards, with knowledge of the sale to me, purchase the remainder, and removes his part of the lot, leaving my quantity undisturbed, how can he be liable to me, even though the seller should afterwards fraudulently dispose of my part to other parties?" The learned judge was therefore brought to the conclusion that the contractor was entitled to be protected in the possession and enjoyment of the certificates transferred to him.

This decision, upon the facts stated, cannot be questioned. It does not appear from anything stated in the report of the case whether the trust deed was duly recorded or not. If it was recorded, it is difficult to see how the contractor could have received the certificates without notice of the prior right of the mortgagee to receive certificates for twelve sections of land per mile of road, and, consequently, why he had not a prior lien upon the land to the amount of thirteen hundred and twenty sections.

136. A mortgage by a railroad company embracing all property which it may subsequently acquire includes a lease which it afterwards takes of another railroad. Upon the subsequent bankruptcy of the corporation, its assignees in bankruptcy cannot maintain a title to the leased road as against the mortgage trustees.[1]

Lands which a railroad company has contracted for after a

[1] Barnard *v.* Norwich & Worcester R. 14 Nl. Bank. R. 469; *S. C.* 3 Cent. R. Co. U. S. Circuit Court for Mass. 1876, L. J. 608.

mortgage of all its property, and has taken possession of and used for depot grounds, paying a portion of the purchase money, are subject to the mortgage, and the mortgagee, or the purchaser under the mortgage, may compel the execution of a conveyance upon the payment of the balance of the purchase money.[1]

137. **The enumeration of some articles excludes others.** — The Vermont Central Railroad Company having made a mortgage which by its terms covered such personal property as might afterwards be changed or removed by the company, some years afterwards made a conveyance apparently in confirmation of this provision of the mortgage, reciting that the personal property existing at the date of it had become diminished and impaired by use, and other personal property acquired, which had gone into the possession of the trustees, and therefore this deed was executed to carry the mortgage into effect. The deed, however, was "of all the articles of personal property acquired by the company since the date of the mortgage, consisting, among other things, of the following, to wit;" and then enumerated by name several engines, and by number several different kinds of cars. It was held that these general words should be construed as referring only to articles of the same nature and kind as those specifically named, and therefore did not embrace machinery for "burnetizing" ties and timber.[2]

138. **Capital stock of another company.** — A mortgage given upon the real and personal property of a railroad corporation then held or acquired, or thereafter to be held or acquired, covers the capital stock of another railroad company, subsequently purchased by the mortgagors for the purpose of effecting a consolidation of the roads.[3] It is not necessary to the validity of such a mortgage that it should have been filed in accordance with the provisions of the act concerning chattel mortgages. The capital stock of a corporation is not goods or chattels within the meaning of the statute, which has reference only to pledges of personal property of a kind which is capable of visible possession.[4]

[1] Farmers' Loan & Trust Co. *v.* Fisher, 17 Wis. 114.

[2] Brainerd *v.* Peck, 34 Vt. 496.

[3] Williamson *v.* N. J. Southern R. R. Co. 26 N. J. Eq. 398.

[4] Williamson *v.* N. J. Southern R. R. Co. *supra*.

139. Iron rails not laid. — A mortgage of "all rolling stock, equipments, and materials whatsoever," which may be acquired by the mortgagor, or furnished for the use of its road, embraces iron rails purchased by the company for its use, although still in the hands of its agents at a distant port. The St. Paul and Pacific Railroad Company having made such a mortgage after having purchased a large amount of iron, by a resolution of its board of directors authorized one of the mortgage trustees to pledge, hypothecate, sell, or dispose of the iron rails of the company, then in New York or elsewhere, or afterward to arrive, for such sums and on such terms as were in his judgment best for the interest of the company, for the purpose of raising money necessary to meet past and future estimates for construction account of the extension of the roads, and for duties, freights, and advances on the same account; and the trustee accordingly disposed of the railway iron principally to the firms of Jay Cook & Co., and Jay Cook, McCullock & Co., of both of which firms this trustee was a member. He was also the acting man of the mortgage trustees, and the construction agent of the company. An action was brought against the company, the mortgage trustees and others, to restrain this fraudulent diversion of the iron, and it was held that the action could be maintained, and that an injunction restraining the completion of the transfer of the property was properly granted.[1] The iron rails became a part of the security in equity against persons buying them with notice of the facts, or without paying value for them. To that extent the bondholders had an equitable right that they should be used only for the purposes for which they had been bought, and that was, to construct the railroad track with them. The firms, of which the trustee was a member, are chargeable with knowledge of the mortgage, and the equitable lien of it upon this property, and therefore they could acquire no title as against the bondholders. A portion of the iron was transferred by Jay Cook, McCullock & Co., to the secretary of the navy of the United States, in part to secure a debt of the firm and in part to secure an advance made at the time. Accordingly, it was held that the transfer was invalid so far as it secured a prior indebtedness, because the secretary relinquished nothing for the transfer, and took no better title than the firm themselves had; but so far as the transfer secured an advance

[1] Weetjen *v.* St. Paul & Pacific R. R. Co. 4 Hun (N. Y.), 529.

made at the time the transaction was valid, being without notice of the equity of the bondholders and for an actual consideration paid.

140. **Fuel.** — The Androscoggin Railroad Company having been authorized to extend its road, and to make a mortgage of the property then owned by both the new and old portions of the road, and "all the property of said extension subsequently to be acquired," and having executed the mortgage accordingly, afterwards purchased with the earnings of the whole road wood for the use of the whole road. It was held that such wood was not property of the extension afterwards acquired, within the terms of the mortgage, and was therefore subject to attachment at the suit of a creditor of the company.[1]

141. **Office furniture,** suitable in kind and of a necessary amount, provided for the use of the employees of the company in the performance of their daily duties, as well as for the use of the directors of the company to transact their business, is embraced in a mortgage of a road, its franchises and property then owned or thereafter to be acquired. Such property is attached to or incident to the road itself. The mortgagee may, upon default, take possession of it; or if a judgment creditor attempts to levy an execution upon it, the mortgagee may have the proceedings enjoined, especially if it appears that the other mortgaged property would be insufficient to pay in full the mortgage debt.[2]

III. *Mortgages attach to after-acquired Property subject to Liens upon it when acquired.*

142. **A mortgage of after-acquired property can only attach to such property in the condition in which it comes into the mortgagor's hands.**[3] — If it is already subject to mortgages or other liens, the general mortgage does not displace them although they may be junior in point of time. They only attach

[1] City of Bath *v.* Miller, 53 Me. 308. See § 113.

[2] Ludlow *v.* Hurd, 1 Dis. (Ohio) 552. See § 111.

[3] Dunham *v.* Cincinnati, Pern, &c. Ry. Co. 1 Wall. 254; Galveston R. R. Co. *v.* Cowdrey, 11 Ib. 459; United States *v.* N. O. R. R. Co. 12 Wall. 362; Willink *v.* Morris Canal & Banking Co. 3 Green (N. J.) Ch. 377.

to such interest as the mortgagor acquires. Therefore, a mechanic's lien for work done and materials furnished in building for a railroad company docks, wharves, and piers upon a branch road, acquired after the making of the mortgage, takes precedence of the mortgage. It is immaterial in such case that the property was acquired, not by grant but by obtaining a controlling interest in the capital stock of another road which owned the property.[1] When in this case the decree of the chancellor was signed, which established the lien of the mortgage upon the branch road, a mechanic's lien had been acquired on the premises, which related back to the commencement of the building, and was entitled to priority over all conveyances, mortgages, or incumbrances subsequent thereto. This lien was not displaced by the chancellor's decree, which, in the absence of fraud, could be effective only to bring under the mortgage the lands of the branch company, subject to such liens as were lawfully acquired, while the legal estate was in that company.[2]

143. When a railroad company holds property under a conditional sale, as for instance when railroad iron has been annexed under an agreement that it shall be laid upon a designated part of the track, and that upon payment it shall become the property of the company, but that the title should not pass until such payment, a subsequent mortgagee of the road with notice of the agreement acquires no interest in it.[3] There is in such case no difficulty in tracing and identifying the iron. It is unlike a case where bricks, or nails, or other materials are used in the construction of a house, and are so incorporated with the building that they cannot be separated and traced. It is rather analogous to the case of a house or a fence set on land of another, with his assent, and under an agreement that the house or fence should remain the personal property of the original owner. The agreement of the parties would supersede the general rule of law, and prevent the house or fence becoming annexed in law to the land. The mortgagee with notice stands in the same position as the company itself. Notice to the trustees under the mortgage is notice to the bondholders. It would be impracticable to affect the bondholders

[1] Williamson *v.* N. J. Southern Ry. Co. 28 N. J. Eq. 277, 298; 29 Ib. 311.

[2] *S. C.* in Court of Errors and Appeals, March T. 1878, affirming the Chancellor's decree upon this point. 29 N. J. Eq. 311.

[3] Haven *v.* Emery, 33 N. H. 66.

with actual notice in any way except through the trustees, through whom the bondholders claim.

But a verbal agreement of the mortgagor that after-acquired property shall remain the property of the vendor until it is paid for, does not constitute a lien within the rule that a mortgagee takes after-acquired property *cum onere;* at any rate such is the law when the property is personal, and a statute makes an agreement that the vendor shall retain the title invalid against creditors without notice unless the instrument be in writing and recorded.[1]

144. The mortgage does not cover property afterwards acquired through fraud. — Mortgagees of a railway who have taken possession of the road under their mortgage cannot, however, retain possession of rolling stock which the company has acquired by fraud. The Lehigh Car Manufacturing Company contracted to deliver to the New Jersey Southern Railroad Company one hundred box cars at a stipulated price, payable in the notes of the company secured by its first mortgage bonds. A part of the cars was delivered to the company, which gave its notes and certain bonds called consolidated first mortgage bonds as security. The manufacturers having been informed some time afterwards that the bonds were not first mortgage bonds, inquired of the secretary of the company about them, and was assured that they were such bonds. Some two or three months afterwards the manufacturers having discovered that the bonds received were worthless demanded a return of the cars, which was refused. The company was shortly afterwards declared insolvent, and possession of its property was delivered to the trustees of the first mortgage bondholders. The trustees insisted that the car company could not be permitted to rescind the contract of sale and retake the cars, because they did not elect to do so within a reasonable time. The car company, on the other hand, claimed that they were defrauded in the transaction, and that they took advantage of the fraud in due season after the discovery of it. It appeared that the consolidated bonds were issued under a scheme started by Jay Gould, then the president of the road, for the consolidation of several roads, and the retiring of the existing bonds of the road by issuing the new consolidated bonds. The consolidation of the roads never took place, and the bonds issued to the car company were worth-

[1] Taylor *v.* Burlington, Cedar Rapids & Minn. Ry. 11 West. Jur. 337.

less. The chancellor held that although the property passed by the sale, which was not void but only voidable at the election of the vendor, the latter might rescind the contract of sale at any time after the discovery of the fraud, so long as no innocent third party had acquired an interest in the property, and the position of the railroad company was no worse by reason of the delay. The sale was regarded as conditional, the conditions being that the security provided for in the contract should be given simultaneously with the delivery of the property. The car company did not lose its property in the cars by delivering them to the railroad company, because the cars, being built according to specifications, the vendee had the right, as incident to the contract, to require a delivery of them for the purpose of inspection and examination.[1]

Moreover, the car company having been induced to part with the cars by fraudulent means, could, within a reasonable time, disaffirm the sale and reclaim the property. Although delivery had been made, no title would pass until with knowledge of the fraud it elected to ratify and confirm the sale, or third persons acting upon the supposition of the ownership by the fraudulent vendee had, in good faith and for a valuable consideration, acquired rights therein. But the mortgagee in this case occupied no better position, either at law or in equity, than the railroad company. When he took possession of the road under the mortgage, he took possession of the cars as part of the equipment; but he paid no consideration for them, and parted with nothing on the faith of the supposed ownership of the property by the mortgagor. Although a mortgage of property afterwards to be acquired attaches to the property as soon as it comes into the possession of the mortgagor, this is only in accordance with the principle of equity, that what ought to be done is considered as done. Unless the mortgagee has an equitable right to hold such property, such as would be the ground of a decree of specific performance, a court of equity will not aid him in enforcing the contract.

Upon appeal from the decree of the chancellor, Mr. Justice Depue, delivering the opinion of the Court of Errors and Appeals, upon this part of the case, said: "The decree of the chancellor, recognizing the rights of the car company as superior to those of the complainant, is consistent with principles of equity. But the relief granted is, in my judgment, too circumscribed. The de-

[1] Williamson *v.* N. J. Southern R. R. Co. 28 N. J. Eq. 277.

cree merely directs that the complainant deliver up the said cars to the car company. The complainant obtained the possession of the cars when he was put in possession of the railroad, in January, 1874. He has ever since operated the road with the rolling stock, including these cars, practically under the supervision of the Court of Chancery. In February, 1876, the car company made a demand of the complainant for the return of the cars, and on the 5th of February, 1876, began an action of replevin in the Supreme Court of this state against the complainant individually, for the recovery of the same. Under the writ issued in that suit, the sheriff of Hudson County seized the said cars, and held them in his possession until they were redelivered to the complainant, pursuant to the ninth section of the act concerning replevin.[1] The car company was made a party to this suit, by the second supplemental bill filed on the 20th of September, 1876, and the prosecution of the replevin suit was enjoined. Under the proof in this case, the car company would have succeeded in its action of replevin, and the damages recoverable would have been the value of the property at the time of demand made, and damages for its detention therefor; and the complainant, after judgment paid, would have been entitled to be reimbursed the amount thereof out of the trust funds in his hands.[2]

"The decree does not do complete justice to the car company, nor does it give the complainant adequate indemnity. In substance, it merely releases the hold of the court upon the property, and directs the complainant to redeliver it. The car company, having brought its action of replevin, and the cars having been redelivered to the defendant in that suit, it is not bound to accept a return of its property in satisfaction of its cause of action. In replevin, where the property has been redelivered to the defendant, the plaintiff may have its value adjudged to him absolutely as part of his damages, and the defendant cannot discharge himself from the payment of such damages by a return of the property.[3] To leave the litigation open in the suit at law, with a result that can be foreseen, is not advisable at this stage of the case. A Court of Equity always aims to make its determination complete, if it be possible. That may be done in this instance, within

[1] Revision 1877, p. 972.

[2] Frazier *v.* Fredericks, 4 Zab. (N. J.) 162.

[3] Field *v.* Post, 9 Vroom (N. J.), 346.

the scope which this litigation has been permitted to assume. Nor would it be proper relief to remit the car company to the position of the holder of the bonds of the railroad company to the amount of the bonds deliverable under the original contract. The bonds which the car company should have received had then a market value which they probably do not now possess. Having taken proper steps to rescind the contract of sale on justifiable grounds, the legal result of the rescission was, to revest the property in the company, with a right to maintain an action for its recovery, in which the measure of redress was the value of the property at the time of the demand made on the complainant, and damages thereafter. The Court of Chancery having assumed jurisdiction of that controversy, should grant the same measure of relief as would have been obtained in the action at law. To that end the decree of the chancellor should be modified, and a decree made in favor of the car company for the value of the cars in the complainant's possession at the time of demand made on him at what they were then worth, with interest on such valuation, to be ascertained by a reference to a master." [1]

145. Junior mortgagees of railroad property who by express terms take subject to a prior mortgage of the road, constructed or to be constructed, all property then owned by the corporation or afterwards to be acquired for the use of the road, cannot claim such after-acquired property as against the prior mortgagees. The junior mortgagees are not in such case *bonâ fide* purchasers for value without notice.[2] And in like manner the holders of a chattel mortgage upon the rolling stock of a railroad, who had previously as agents of the railroad company actively participated in negotiating a prior mortgage of the road and all its after-acquired property, cannot claim to avoid such prior mortgage in respect to after-acquired rolling stock, or question its validity because it was not filed as a chattel mortgage.[3]

[1] Williamson *v.* N. J. Southern R. R. Co. 29 N. J. Eq. 311, 321.

[2] Stevens *v.* Watson, 4 Abb. (N. Y.) App. Dec. 302.

[3] Benjamin *v.* Elmira, Jefferson & Canandaigua R. R. Co. 54 N. Y. 675; *S. C.* 49 Barb. 441.

CHAPTER V.

LEGAL NATURE OF ROLLING STOCK OF RAILROADS.

I. After-acquired rolling stock is subject to mortgage, 146–153.
II. Rolling stock regarded as fixtures, 154–163.
III. Rolling stock regarded as personal property, 164–170.
IV. Constitutional and statutory provisions regarding rolling stock, 171–187.

146. Introductory. — Questions as to the legal nature of the property of railroad companies embraced under the general term of rolling stock have, within the last few years, frequently come before our courts, both state and federal, for determination. These questions are presented in various forms. More frequently than in any other way they have arisen in the endeavors of the general creditors of such corporations to attach, or levy executions upon, rolling stock as personal property, when either the companies themselves or their mortgage creditors have claimed that such property is a part of the realty, or, at least, is an incident of the franchise, so that it cannot be separated by seizure and sale under execution. Sometimes the inquiry has been whether mortgages which do not in terms apply to the rolling stock nevertheless embrace it as fixtures of the realty; or whether mortgages which in terms do apply to such property are effectual when recorded only as real property mortgages. Again, the subject has been presented in another aspect, under laws of taxation which have not expressly or impliedly defined the *status* of this species of property.

When rolling stock is mortgaged in connection with the real property of a railroad company, the effect of the mortgage may be considered as between the parties themselves, or as between the mortgagees and subsequent purchasers or judgment creditors. Between the parties themselves, no question as to the proper registration of the mortgage can arise; and, generally, the only question between them respecting such property is whether the mortgage covers after-acquired property of this kind. The same question may arise between the mortgagees and subsequent purchasers or

incumbrancers. Quite different principles, however, are applicable to the determination of this inquiry from those that apply to the contentions of the same parties whether such property is a fixture — and, therefore, a part of the realty itself — or is personalty. Upon this part of the subject there is great confusion and contradiction of authority. In many states there are now statutory enactments which attempt to dispose of the vexed questions; but these enactments are as diverse as were the decisions of the courts. It is of little consequence, however, whether the statutes fix the *status* of such property as realty or personalty, so long as they afford a fixed rule for the guidance of the parties.

Discriminating, therefore, between the different aspects of the subject presented by these legal questions, the first proposition to be considered is: —

I. *After-acquired Rolling Stock is subject to Mortgage.*

147. A mortgage of a railroad afterwards to be built, and of the rolling-stock and other property appurtenant to such road, attaches to the road and the rolling stock as they are built and acquired. Such a mortgage is a lien superior to that of a subsequent mortgage, made after the road has been completed and equipped; and in like manner superior to a judgment lien which has afterwards attached to such property.[1] Although the mortgage may have been "given before a shovel had been put into the ground towards constructing the railroad, yet, if it assumed to convey and mortgage the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by, the deed and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels, as sections of the road were completed, and trust deeds could safely be given thereon. The practice of the country and its necessities are in coincidence with the rule."[2]

[1] Pennock *v.* Coe, 23 How. 117; Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459, 481; Dunham *v.* Cincinnati, Peru, &c. Ry. Co. 1 Wall. 254, 266; Meyer *v.* Johnson, 53 Ala. 237, 324; Scott *v.* Clinton & Springfield R. R. Co. 6 Biss. 529, 535.

[2] Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459, 481, per Bradley, J.

148. Coe *v.* Pennock.[1]— One of the earliest cases involving a judicial construction of a mortgage of the rolling stock of a railroad company was decided by the Circuit Court of the United States in 1857, and two years afterwards by the Supreme Court.[2]

The Cleveland, Zanesville, and Cincinnati Railroad Company executed a mortgage of all its present and subsequently acquired property, including engines, tenders, cars, and all other personal property. The railroad was in course of construction, and only a small portion of it was finished at the time of the mortgage. This contained a covenant that the money borrowed should be applied to the construction and equipment of the road. The rolling stock was afterwards levied upon by holders of subsequent mortgage bonds. Whereupon the trustees under the first mortgage filed a bill to restrain a sale under the execution. The Circuit Court rendered a decree perpetually enjoining the sale, and this decree was affirmed by the Supreme Court. Mr. Justice Nelson, delivering the opinion of the Supreme Court, said: "If we are at liberty to determine this question by the terms and clear intent of the agreement of the parties, it will be found a very plain one. The company have agreed with the bondholders (for the mortgagee repre sents them) that, if they will advance their money to build the road and equip it, the road and equipments thus constructed, and as fast as constructed, shall be pledged as a security for the loan. This is the simple contract when stripped of form and verbiage; and, in order to carry out this intent most effectually, and with as little hazard as possible to the lender, the company specially stipulate that the money thus borrowed shall be faithfully applied in the construction and equipment of the road. And in further fulfilment of the intent, the company agree that, in case of default in payment of principal or interest, the bondholders may enter and take possession of the road, and run it themselves, by their agents, applying the net proceeds to the payment of the debt." The bondholders, he continued, have fulfilled their part of the agreement by advancing the money on the faith of the security; and the question is whether there is any rule of law or principle of equity that denies them the benefit of the security they contracted for. After examining the arguments against giving effect to a mortgage of after-acquired property, in conclusion, he says that

[1] 6 Am. Law Reg. 27; 2 Redf. Am. Ry. Cases, 667.

[2] *Sub nom.* Pennock *v.* Coe, 23 How. 117.

the court is satisfied that the mortgage attached to the future acquisitions, as described in it, from the time they came into existence.

149. **It is not essential that the rolling-stock should be especially mentioned in the mortgage** in order that it may pass by it. A mortgage of a road and its fixtures, together with "all other property now owned and which may be hereafter owned by the railroad company," embraces cars, locomotives, and other rolling stock purchased by the company from time to time after the making of the mortgage.[1] In like manner a mortgage of an entire line of railroad, "with all the revenue or tolls thereof," was held to cover, not only the line of the road, but all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenues.[2] The same view was expressed by the district judge of the United States for the District of Indiana,[3] as to the effect of a mortgage by a railway company of "all the present and future to be acquired property of the company," "together with the tolls or income to be had or levied therefrom." The latter clause seemed to be regarded as more decisive than the former that the rolling stock of the road was included. Applying the maxim, that whosoever grants a thing is supposed also, tacitly, to grant that without which the grant itself would be of no effect,[4] the tolls and income being expressly mortgaged, the rolling stock, which is essential to the production of tolls and income, must be included in the grant. "On a foreclosure the lands, superstructures, and fixtures might, indeed, be sold; but the tolls and income could not be. Besides, the deed of trust provides another remedy to the mortgagees in case of a default by the mortgagors — the very remedy which the complainant is now seeking through a receiver. It provides that in case of a default the trustees may enter and take possession of the mortgaged property, and use and operate the same, and apply the proceeds thereof to the payment of the interest and principal of the bonds intended to be secured by the mortgage. Now, in pursuing this remedy, of what avail would all the other property be

[1] Meyer *v.* Johnston, 53 Ala. 237, 332.

[2] State of Maryland *v.* Northern Central Ry. Co. 18 Md. 193.

[3] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35, 43.

[4] Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit. 11 Rep. 52; Broom's Leg. Max. 479.

if the rolling stock cannot be used? Nay, could the remedy be pursued at all without the use of the rolling stock? The reason of the rule — that, when a man grants a tract of land in the centre of a larger tract owned by him, he also grants, by implication, a right of way into it — fully applies to the case in question; and it strongly applies to the mortgage of tolls and income."

A mortgage of a "road and its franchise" was, however, regarded by the Supreme Court of Vermont as excluding from its operation the rolling stock, and other personal chattels that go to make up the usual and necessary equipment and furnishing of the road, but not so affixed to the land as to partake of the character of realty.[1]

If rolling stock be regarded as an accession, in the nature of a fixture to the road, it passes by a mortgage of the road without express mention; and it is then immaterial whether it be in existence when the mortgage is given, or be afterwards acquired.

150. Many authorities, without going to the extent of holding that engines and cars are fixtures, regard them as so indispensable to the operation of a railroad that they make a distinction between the rolling stock and other kinds of personal property, in respect to the rule that property not *in esse* cannot be conveyed. The rolling stock of a railroad is regarded as so appurtenant to the road, that when the company makes a mortgage of its road and franchise, it has a present existing interest in the rolling stock to be acquired for its use sufficient to uphold a grant of it as incident to the road. Their title to the road and franchise is the foundation of an interest in the cars and engines to be acquired for its use.[2] A lien, moreover, may be created without a grant. A contract intended as a grant, or one stipulating the making of a grant at a future time, may be upheld in equity as a present lien.

The York and Cumberland Railroad Company, in 1851, issued bonds secured by a mortgage, in trust, of its road and franchise, together with all "cars, engines, and furniture that may have been or may be purchased by said company." Some two years afterwards the company purchased an engine and certain cars,

[1] Miller *v.* Rutland & Washington R. R. Co. 36 Vt. 452.

[2] Morrill *v.* Noyes, 56 Me. 458, 471.

which they subsequently mortgaged. In 1859, a suit in equity was commenced in behalf of the bondholders under the first mortgage to compel the execution of the trust, and a receiver was appointed, who took possession of all the property of the company, including the engine and cars which were the subject of the second mortgage, and which were in daily use upon the road. The second mortgagee, after a demand for their surrender, brought an action of trover, and obtained leave of court to prosecute it. It was held that the lien of the existing mortgage attached to the rolling stock as soon as it was purchased and placed upon the road, and that the second mortgagee acquired no title which he could maintain against the former mortgage.[1]

This decision might have been placed upon the ground that the mortgagee of the rolling stock had notice of the prior mortgage in which this property was also included; and in that case the question of the proper registry of the first mortgage would not be raised, for the knowledge of the second mortgagee of the existence of such mortgage would be equivalent to a due record of it.

A mortgage of a railroad, "together with the superstructure and tracks thereon, and all rails and other materials used thereon or procured therefor, and engines, tenders, cars, tools, materials, machinery, contracts, and all other personal property" then owned by it, or in future to be acquired, was held to include cars, wheels, firewood obtained for the use of the engines, and coal for the use of a machine-shop, as things incident and indispensable to the use and enjoyment of the principal thing conveyed.[2]

151. A mortgage attaches to rolling stock subject to the liens existing upon it when it is acquired. — The New Orleans and Ohio Railroad Company, having made a mortgage covering all future-acquired property, afterwards purchased of the United States certain locomotives and cars, for which it gave a bond stipulating that the United States should have a lien upon the property for the purchase money, and that the company should not part with it without written consent until payment of the price. The trustee for the bondholders claimed that the mortgage upon

[1] Morrill *v.* Noyes, 56 Me. 458.

[2] Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 448.

the road, being prior in date to the bond, attached to the property as soon as purchased, and displaced any junior lien. "This, we apprehend," said Mr. Justice Bradley, delivering the opinion of the court,[1] "is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and, if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors. Had the property sold by the government to the railroad company been rails, as in the case of the *Galveston Railroad Company* v. *Cowdrey*,[2] or any other material which became affixed to, and a part of, the principal thing, the result would have been different. But, being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad itself, are unaffected by a prior general mortgage given by the company, and paramount thereto. In the case before us the United States, at the time of making the sale, reserved a lien on the property, and imposed a condition of non-alienation until the price should be paid. Taken altogether, the transaction amounts to a transfer *sub modo*, and the lien must be regarded as attaching to the property itself, and as paramount to any other liens arising from the prior act of the company."

152. In Alabama it is held that rolling stock so appertains

[1] United States *v.* New Orleans R. R. Co. 12 Wall. 362, 364.

[2] 11 Wall. 459.

to a railroad as to become subject, on this ground, to a mortgage of it and its after-acquired property, whenever such property is acquired. Yet the rolling stock, as personal chattels not identified with the realty, does not become released from the liens under which the company has acquired it.[1] The Alabama and Tennessee River Railroad Company, in 1852, executed a mortgage of its road then constructed and to be constructed, and of all other property then owned and which might thereafter be owned by the company, together with its tolls and income. Some years afterwards this road was united with other roads, and a new name was given to the consolidated roads, and other mortgages were made by these. Upon a foreclosure of a subsequent mortgage it was held that the lien of the first mortgage extended to the cars, locomotives, and other personal movable property appertaining to the railroad; and that this lien was not restricted to so much of the rolling stock as remained of what the company owned at the time of the consolidation. If the Alabama and Tennessee River Railroad Company had then ceased to exist, the lien of the mortgage would not have attached to any rolling stock acquired afterwards, because the acquisition would not have been made by the mortgagor; but, as the court held that this company continued its existence after the consolidation under a new name, it necessarily follows that the mortgage given by it embraced the rolling stock held at the time of the foreclosure to the same extent, or in the same proportion, that it embraced the railroad itself.[2]

In 1873 the receivers were authorized, pending the foreclosure suit, to buy a large quantity of rolling stock, and for that purpose to issue certificates and make them a prior lien upon the road and property. Some part of the rolling stock so purchased was already upon the road, and in use by it under contracts and leases; and it was contended by some of the mortgage creditors that such rolling stock, although not paid for by the company, became subject to the liens of the mortgages when put upon the mortgaged road; and, moreover, that even the new rolling stock purchased by the receivers, and put upon the road by them under authority of the court, became subject to the liens of the mortgages in preference to the liens authorized by the court in the order for purchase. But the court held that the lien authorized by the court

[1] Meyer *v.* Johnston, 53 Ala. 237, 324, 353.

[2] Meyer *v.* Johnston, 53 Ala. 332.

could not be superseded or lessened by the mortgages ; that while it is true that when a railroad company which has executed several successive mortgages of its road, equipments, and appurtenances, purchases and puts upon its road rolling stock which is then free from all liens, this property so appertains to the road as to become subject to the mortgages which have priority, according to the date of their execution ; yet such property does not become so identified with the realty by being placed upon it that it is released from the liens attaching to it when it was acquired. Liens upon the rolling stock existing upon it when it comes into the mortgagor's possession remain binding upon it, and superior to those of the mortgage existing at the time upon the railroad.[1]

153. It may, therefore, be regarded as judicially settled, with little or no divergence of opinion, that, in equity, a mortgage of a railroad will be held to apply to after-acquired rolling stock, and other personal property, if the terms of the mortgage cover such future acquisitions ; with the qualification, however, that the mortgage will attach to such property subject to the liens existing upon it when it comes into the hands of the mortgagor.

II. *Rolling Stock regarded as Fixtures.*

154. There are many considerations why rolling stock should be regarded as strictly of the nature of fixtures. — It is fitted to the gauge of the road and adapted particularly for use upon it. Without it the road is not only worthless to the company, but it ceases to be of use to the public, which is one of the purposes for which the company was chartered. The fact that the rolling stock is not actually attached to the land, but may be transferred to another road and used upon that equally well, is not decisive against its being a fixture. The manner and degree of annexation to the realty is only one element in determining whether any article of personal property is a fixture or not ; while the intention of the parties with reference to making it a permanent accession to the freehold, and its adaptation to the use and purpose for which it is attached, are considerations of equal importance, at least, in determining the question. These considerations are to be unitedly applied.

[1] Meyer *v.* Johnston, 53 Ala. 352.

155. The actual fastening of a personal article to the freehold is not essential to its becoming a fixture. — "If a billiard-table be fastened to the floor so as to be conceded a fixture, would not the balls and cues pass also? A bucket in a well may be detached, and it is movable, running from top to bottom of the well, yet it is a fixture by common consent. A shuttle in a loom is thrown from place to place by the motive power of the machinery, yet it is an essential part of the machine." In the cases mentioned, the billiard-balls, the bucket, and the shuttle are fixtures solely because they are essential to the use of the property of which they are parts, although disconnected parts. In like manner the cars and engines of a railroad are essential to the use of the road. "The right to buy and own rolling stock is a franchise, and can only be exercised as an accessory to the operation of a railroad. Any buying or selling of cars, engines, and the like, by the company, for the mere purpose of speculation, would be unauthorized and illegal. Here, then, is a consideration showing that a company intends the rolling stock to be used only for the road, or, in other words, to become a permanent accession to the real estate of the company. The intention of the owner, the use for which the property was designed, the connection between the road and the cars, and the essential relation between them for the purpose of revenue, all combine to declare the rolling stock real estate." [1]

156. It is not necessary, as to rolling stock, to record a mortgage of it as a chattel mortgage. — One of the latest cases supporting this view came before the United States Circuit Court for the District of Kansas.[2] The mortgage covered the rolling stock and other property appertaining to the defendant railroad company. The mortgage had been duly recorded as a real estate mortgage, but not as a chattel mortgage. Certain judgment creditors of the mortgagor levied upon the rolling stock embraced in the mortgage; and the question was whether their rights were prior to those of the mortgagees. Mr. Justice Miller, of the Supreme Court of the United States, delivered the opinion of the

[1] Minnesota Co. *v.* St. Paul Co. 2 Wall. 609; note, p. 648, on rolling stock as a fixture, being an extract from brief of Mr. Carpenter.

[2] Farmers' Loan & Trust Co. *v.* St. Joseph & Denver City Ry. Co. 3 Dill. 412.

court, Judge Dillon concurring: "After having taken time to consider the question involved in this case, my judgment is that it was not necessary, as to the rolling stock, to record the instrument as a chattel mortgage. As to this it is sufficient, even as to creditors, that the mortgage was duly registered as a mortgage of real estate. In my opinion rolling stock and other property strictly and properly appurtenant to the road is part of the road and covered by the mortgage in question, which in terms embraces rolling stock. The cases are conflicting upon the point of the *nature of rolling stock;* but, considering the peculiar character of a railroad, the true principle is the one above stated. Under the provisions of this mortgage a different principle would apply to fuel or other property personal in its nature, and which is used, or is such as is commonly used, for other than railway purposes. Such property would be subject to the levy, and not be held by the mortgage." The opinion of the court does not clearly indicate whether the registry was considered sufficient on the ground that the rolling stock is a fixture, or on the ground that such property does not come within the purview of the statute relating to the record of chattel mortgages; but it would seem to be on the former ground.

The La Crosse and Milwaukee Railroad Company, in 1856, mortgaged the western division of its road, from Portage to La Crosse, a distance of 105 miles; and in the following year mortgaged its eastern division, from Milwaukee to Portage, a distance of 95 miles, to secure other bondholders; and again, in the next following year, executed a mortgage of the whole line of its road from Milwaukee to La Crosse to secure another issue of bonds. Each mortgage embraced "all and singular the locomotive engines and other rolling stock, and all other equipments of every kind and description which have already been or may hereafter be procured for or used on said road;" and each was in terms made subject to all prior mortgages of the road. The rolling stock was purchased with the funds of the company, and was placed and used on the entire line of the road, embracing both divisions, and no division of it was ever made between the two divisions. It was held, therefore, that the mortgages operated upon all the rolling stock in the order of their dates; and that the mortgage of the western division, being the oldest, had priority of lien upon the entire rolling stock of the company.[1]

[1] Minnesota Co. *v.* St. Paul Co. 6 Wall. 742.

It is possible, however, for a railroad company owning the whole of a long road, and all the rolling stock upon it, to assign certain cars and engines to particular divisions of the road, so that such rolling stock would attend such divisions and pass by separate mortgages of them. Whether in any particular case a railroad company has divided its rolling stock and mortgaged it in this way is a question of intention.[1]

157. In Illinois it was settled that rolling stock is a fixture which passes by a mortgage of the road,[2] by several cases decided as early as 1860 and 1861. As a part of the realty, such property was not subject to the laws relating to mortgages of personal chattels. Locomotives and cars in and upon the road, or intended for immediate use upon it, could not be taken on execution by a creditor and severed from the road so as to change them into personalty. If this could be done, say the court, in one case, houses, fences, timber, fruit-trees, and almost every description of improvements might in the same way be converted into personalty.[3] In all the cases it seemed to be taken as an unquestioned doctrine that the rolling stock passed as a portion of the realty.

Thus stood the law on this subject until the Constitution of 1870[4] provided that "rolling stock, and all other movable property belonging to any railroad company or corporation in this state, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and the general assembly shall pass no law exempting any such property from execution and sale." But even this provision is declared by the Circuit Court of the United States not to change the rule that a mortgage made by a railroad company, covering all after-acquired property, includes rolling stock, if the mortgage be given before the rights of execution creditors attach.[5] Such a mortgage seizes the property or operates on it by way of estoppel as soon as it comes into existence, and is in

[1] Minnesota Co. *v.* St. Paul Co. 2 Wall. 609.

[2] Palmer *v.* Forbes, 23 Ill. 301, 302; Hunt *v.* Bullock, 23 Ill. 320; Titus *v.* Mabee, 25 Ill. 257; Titus *v.* Ginheimer, 27 Ill. 462. See, however, an earlier case, in which it was held that a road and its furniture do not constitute one thing; that the furniture of a road is no more a part of the road than is the furniture of a house a part of a house. Sangamon & Morgan, R. R. Co. *v.* County of Morgan, 14 Ill. 163.

[3] Titus *v.* Mabee, 25 Ill. 257, per Walker, J.

[4] Art. 11, § 10.

[5] Scott *v.* Clinton & Springfield R. R. Co. 6 Biss. 529.

possession of the mortgagor, and confers an equity prior to claims under judgments and executions subsequently obtained. The principle is the same whether the property be regarded as real or personal.[1]

158. That the franchise, lands, and property of corporations chartered for the use and accommodation of the public cannot be levied upon or sold under execution has been declared by numerous authorities, on the ground that the value and usefulness of the entire corporate property, and of the corporate franchise, would thus be destroyed. This was the view taken by the Supreme Court of the United States in the case of *Gue* v. *Tide Water Canal Company*.[2] The property levied on in this case was, however, land and fixtures, such as canal-locks, admitted to be necessary to the working of the canal. The sheriff being about to sell the property, the company filed a bill, praying for an injunction against the sale, which was granted and made perpetual by the Circuit Court, and, on appeal, this decree was affirmed. Chief Justice Taney, delivering the opinion of the court, said: "The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it is connected in the hands of the company; and if sold under this *fieri facias*, without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless. Now, it is very clear that the franchise or right to the toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament cannot, upon the settled principles of the common law, be seized under a *fieri facias*. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties show it was not seized, and, consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from those useless canal-locks and lots adjoining them. The record and proceedings before us show that there

[1] Per Drummond, J.

[2] 21 How. 257.

were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise property which was essential to its useful existence."

159. In Pennsylvania the policy of the law with reference to the levying of executions upon a railroad or its appurtenances has been declared in several cases to be, that any property of the corporation necessary to the exercise of the franchises granted to it cannot be levied on and sold under an execution on a judgment against the corporation.[1]

In one case, in which a levy upon loose rails and chairs intended for use in repairing a railroad was called in question, it was held that even if the rails and chairs be not regarded as affixed to the realty, but as standing to the road in the same relation as the rolling stock, — personalty by nature, but appurtenant by use, and necessary to operate the road, — considerations of public policy forbid the levy and sale on execution of such articles. Independently of the public purpose for which they are used, doubtless such property is liable to seizure. This view of the subject was forcibly presented in the Court of Common Pleas of Pennsylvania by Mr. Justice Agnew, afterwards of the supreme bench of that state:[2] "A railroad corporation is but a servant of the state, and, while it has its private ends, it must obtain them through a faithful discharge of its obligation to the public, for whose benefit its powers are conferred. Its charter is not only the grant of its own privileges, but it is the evidence of their consideration arising in the public benefit, and of its contract to subserve this purpose. For this, and this alone, the state imparts a portion of its sovereign power, and invests it with high privileges. So completely subservient is it to the public good, so clearly a trustee for a general purpose, its own property may be

[1] Youngman *v.* Elmira & Williamsport R. R. Co. 65 Pa. St. 278; Shamokin Valley R. R. Co. *v.* Livermore, 47 Pa. St. 465; Susquehanna Canal Co. *v.* Bonham, 9 Watts & S. (Pa.) 27. See, also, Macon & Western R. R. Co. *v.* Parker, 9 Ga. 377.

[2] Covey *v.* Pittsburg, Fort Wayne & Chicago R. R. Co. 3 Phila. Rep. 173.

taken and used to fulfil a higher public use. So much is the notion of a public trust involved in every such charter that every doubt in its interpretation is resolved in favor of the public, and against the private interest. If, besides their rails and their supporting chairs actually imbedded in the track, the company may not maintain deposits of others, at convenient intervals, for immediate repair, and if, because they thus lie in piles they may be seized all along the route by successive writs, the usefulness of the railway as a public work must cease. If it may be dismantled by attacking it in detail and seizing those things most easily removed, though essential to its preservation, it would be but a step to the end; when stripped of all but its road-bed and fixtures, it would be powerless to serve the public or benefit itself.

"The purpose of a railroad, the nature of its property, the necessity of possession to accomplish its purpose, and the powers conferred in the charter, leave no room to doubt the validity of a mortgage, without delivery of possession of those chattels which are necessary to carry out the object of incorporation. Though the body is private, the object is public; and it is clothed with a portion of the sovereign power to accomplish this. But the right of highway and of eminent domain to take private property for its use cannot alone build a railway. The means to pay for labor, machinery, equipment, &c., is essential, and power to borrow money and pledge property is openly conferred in the same charter to which those who assail the mortgage must look for the power to contract with them. Rails for repairs, rolling stock, &c., are as essential to the operation of the road and its public design as the road-bed and fixtures themselves. Having conferred the power to borrow money and mortgage the property, to carry out an object of great public utility, it would be absurd to suppose the legislature meant, in the teeth of its purpose, to require a delivery of the property necessary for this purpose, in order to make the mortgage effectual, while the mortgagees are under no duty to operate the road." [1]

160. Consistent, perhaps, with the foregoing are late cases in that state, in which it was held that, although cars, horses, harnesses, and other personal property of a passenger railway com-

[1] Per Agnew, P. J., in Covey *v.* Pittsburg, Fort Wayne & Chicago R. R. Co. *supra*.

pany, cannot be seized on execution as against a mortgagee of the property, or as against the general creditors of the company after its insolvency, yet in such cases the equity which would restrain a sale at law springs from the fact of insolvency, or from the trusts created by the mortgage. Mr. Justice Woodward, of the Supreme Court of Pennsylvania, in a *nisi prius* case,[1] said: "Where, however, the question is presented independently both of insolvency and mortgage trusts, — where the exemption from levy and sale is claimed on no other ground than that of accession to the corporate franchise, — I cannot agree that rolling stock and equipments are as much exempt as the rails of the road. I know of no reason why a railway company's horses and carriages may not be seized on execution by a judgment creditor in the same manner as the horses and carriages of any other debtor; no reason, I mean, that is intrinsic and self-existent in the economy of the corporation. Reasons may arise out of the equities created in favor of other parties by a state of insolvency, or the fact of a mortgage; but apart from these considerations — considering a railroad company with reference only to its judgment and execution creditors — I suppose it holds its personal property, as all other debtors do, subject to levy and sale for debts. It is attempted to apply the doctrine of fixtures, and to treat everything as part of the company's freehold which is essential to the carrying on of its appropriate business. That doctrine has never been so applied anywhere, I believe, — certainly not here in Pennsylvania." In the case before the court, there being a question whether the company had power to mortgage, the court, without deciding this, enjoined the levying of the execution until further order, but directed that the lien should continue in the mean time.

161. In Kentucky also personal property essential to the operating of a railroad is held not to be subject to execution. Such seizures and sales are thought to lead to results too mischievous to be tolerated. In the case of *Phillips* v. *Winslow*[2] the court say: "If executions can be levied upon one car, they can be levied upon all the cars upon the road. If they can be levied upon part of the fuel, they can be levied upon all of it, and thus the

[1] Loudenschlager *v.* Benton, 3 Grant, 384; 4 Phila. Rep. 420; Brill *v.* West End P. Ry. Co. 4 W. Notes of Cases, 139.

[2] 18 B. Mon. (Ky.) 431, 448; and see Douglass *v.* Cline, 12 Bush (Ky.), 608, 630.

business of the road may be entirely suspended. Such a result would not only produce great injury to the plaintiff (the mortgagee), but great inconvenience to the public. It would prevent all travel upon the road, and effectually destroy its business and its usefulness. If the property was subject to execution, the plaintiff would have no right to complain, let the consequences be what they might; but, not being subject to execution, he has a clear right to apply to the chancellor for an injunction to prevent an act which might be productive of so great an injury; the right to redeem the property, being a right that belongs to the corporation, is liable for its debts; but the defendants were not attempting to sell this equity of redemption, but the property itself, which they had no right to do."

In a later case in this state the court of appeals held that the cars of a railway company are not subject to seizure and sale by a ministerial officer, even for taxes. They are treated as fixtures of its road. The collection of these taxes can be enforced only under the supervision of a court of equitable jurisdiction, in the same manner as the claims of creditors of the company are enforced." [1]

162. In Tennessee it has been held that under a mortgage of the main line of a railroad situated in the State of Arkansas and covering all rolling stock, appurtenances, and income, cars from the main line, found in Tennessee, were not subject to attachment, but were protected as subject to the lien of the mortgage.[2]

163. In New Jersey this question has been very fully discussed, and the arguments upon the question — whether rolling stock is personal property or fixtures to the realty — most ably presented upon both sides in the different decisions rendered in the case of *Williamson* v. *The New Jersey Southern Railroad Company*.[3] The Lackawanna Iron and Coal Company recovered a judgment against this company in 1874, upon which execution was issued, and levies were made in every county of the state through which the road was extended, upon the cars, engines, and rolling stock

[1] Elizabethtown & Paducah R. R. Co. *v.* Elizabethtown, 12 Bush (Ky.), 233.

[2] Buck *v.* Memphis & Little Rock R. R. Co. 4 C. L. J. 430. See § 104.

[3] 28 N. J. Eq 277; *S. C.* 26 N. J. Eq. 398; and finally, in the Court of Errors and Appeals, March term, 1878, 29 N. J. Eq. 311.

of the company. In 1869 the company had executed a mortgage to Williamson, in trust, to secure bonds to the amount of $2,000,000. This deed covered all the railways, branches, rights of way, depots, station-houses, and the company's franchises then held or thereafter to be acquired, including its rolling stock, fixtures, tools, and machinery, and all real estate of every kind, and all personal property of every nature, then held or thereafter to be acquired. A covenant for further assurance provided that the company would hold all after-acquired franchises and property, real and personal, in trust for the mortgagee, and would make conveyance thereof accordingly from time to time, as the same might be acquired. This mortgage was duly recorded as a mortgage of real estate soon after it was executed and delivered, and long before this judgment was recovered; but it was not filed in compliance with the act concerning chattel mortgages. The chancellor, in an able opinion, held that the rolling stock mortgaged with a railroad is a part of the realty; or, if it be considered personalty, the provisions of the act concerning chattel mortgages had no application.[1] "The railway and the cars, with the engines by which they are drawn, together constitute a means by which the power of steam is applied to the purpose of transportation of passengers and freight. The superstructure of the road-bed and the track, with the engines and cars specially adapted thereto, and fitted to roll upon it, together constitute but one machine for those purposes. The track, though merely laid upon the ground, is, by common consent, regarded as real estate. The engines and cars provided by the owners of the road to run thereon, and without which the track is a valueless part of the machine, are not only indispensable to it, but must be regarded as part and parcel of it, and therefore partaking of its character. That railroad cars intended for and placed upon a railroad may be used on any other road of the same gauge does not militate against this proposition. If it did, the fact that a bell in a factory may be used elsewhere; that the stones in a mill may be used in any other mill of the like character; that the doors and shutters of a house may be used in the construction of any other house; and that fixtures in a factory may be made available in many other factories, even of a different character, would have been sufficient to have led the courts to a different conclusion from that at which they have ar-

[1] Williamson *v.* N. Jersey Southern R. R. Co. 28 N. J. Eq. 277.

rived as to the character of such articles in connection with real property. 'That which is parcel, or of the essence of the thing,' says Sheppard, 'although at the time of the grant it be actually severed from it, doth pass by the grant of the thing itself; and, therefore, by the grant of a mill the mill-stone doth pass, albeit at the time of the grant it be actually severed from the mill; so, by the grant of a house the doors, windows, locks, and keys do pass as parcels thereof, albeit at the time of the grant they be actually severed from it.'[1]

"There is, obviously, no force in the argument that there is no necessary connection between railroads and the engines and cars used thereon, seeing that there are railroad companies which own railroads, but no engines or cars, and whose railroads are used by the engines and cars of other companies only. The relation of the cars to the track, their special adaptation to it, and the intention of their owners — where they are also the owners of the track — that they shall be used upon it, are considerations which outweigh the suggestion that a railroad car and a locomotive engine, by themselves considered, are, of course, personal property. So are the stationary engine or the machine in the machine-shop or place of sale, and the belting in the store where it is sold. Property which would otherwise be chattels becomes real estate merely by attachment, by annexation, actual or constructive, for use in connection with the real property to which it is attached. In no other way is its character changed. If, as in the case before me, the owners of a railroad, intending to use it themselves for the purposes for which it was designed, shall themselves supply it with engines and cars necessary for — and, therefore, adapted to — such use, with the intention of using those engines and cars thereon, accordingly the engines and cars may well, under such circumstances as this case presents, be regarded as part and parcel of the railroad. . . . . If the engines and cars were designed to slide upon the rails, there would probably be no question raised as to their character; it would be conceded that they are a part of the realty. The fact that, instead of sliding, they are designed to move on wheels attached to the platforms on which they rest, and which constitute part of them, can make no difference in the principle. In either case they are attached to the track, and adapted thereto to be moved thereon.

[1] Touchst. 90.

The flanges of the wheels confine the cars and engines to the track on which they must run, and which they are not to leave. If they leave it, they usually do so to their destruction. Of the intention in this case to annex (using the term in a technical sense) the cars and engines to the track, there is the most abundant evidence. The mortgage shows it; it is obvious, too, from the character of the property and its relation to the railroad. These latter considerations are of great importance in that connection."

III. *Rolling Stock regarded as Personal Property.*

164. In the last-mentioned case the Court of Errors and Appeals reversed the chancellor's decision in regard to the nature of rolling stock, and established the rule in New Jersey that this kind of property must be regarded as personalty, and that a mortgage of it, to be valid, must conform to the provisions of the act relating to mortgages of property of that description.[1] Mr. Justice Depue delivered the able and learned decision of the court, in the course of which he said: "The criterion of actual connection of the freehold, as a rule for determining when chattels become part of the realty, is as well settled in this state as any other rule of property. Exceptions founded on fanciful and groundless distinctions only tend to produce uncertainty and confusion in the rules of property, which should be permanent and uniform. 'The general importance of the rule,' says Cowen, J., 'which goes upon corporeal annexations, is so great that more evil will result from frittering it away by exceptions than can arise from the hardships of adhering to it in particular cases.'[2] Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their distinctive character as personalty by being affixed to and incorporated with the realty. It is true that engines and cars are adapted to move on the track of the railroad, and are necessary to transact the business for which the railroad was designed. But

[1] Williamson *v.* N. J. Southern R. R. Co. 29 N. J. Eq. 311. In the earlier case of The State Treasurer *v.* Somerville & Easton R. R. Co. (4 Dutch.) 28 N. J. L. 21, rolling stock had been regarded as personal property, and not included under a statute taxing a "road with its appendages." Chief Justice Green declared that engines and cars are no more appendages of a railroad than wagons and carriages are appendages of a highway.

[2] Walker *v.* Sherman, 20 Wend. (N. Y.) 656. See, also, McMillan *v.* N. Y. Water Proof Paper Co. 29 N. J. Eq. 610.

unattached machinery in a factory, the implements of husbandry on a farm, and furniture in a hotel, are similarly adapted for use in the factory, on the farm, in the hotel, and are equally essential to the profitable prosecution of the business in which they are employed. When regard is had to the fundamental and necessary condition under which the law permits chattels to become part of the realty, engines and cars of the rolling stock of a railroad utterly fail to answer the requirements of the law. Cars which left Jersey City this morning, before the close of the succeeding week will be found scattered over all the West, or on the Pacific coast, — their places of transportation through this state being supplied by cars gathered from the railroads of other companies, many of which are located in other states. The suggestion that each one of these cars carries with it the attributes of realty in its journey through other states, or even over other railroads in this state, will show the incongruity of denominating that a fixture which, in its ordinary use, travels over other railroads, and is connected with the railroad of its owner in no other way than in its useful employment in the business in which the company is engaged.

"Having reached the conclusion that the rolling stock of a railroad is personal property, the next inquiry will be, whether a mortgage of such property is within the provisions of the statute requiring such mortgages to be filed. In this state the legislative policy is to require the registry or filing of mortgages of all property which is visible and tangible, and to postpone the lien of every mortgage, not registered or filed as prescribed by law, to the claims of third persons — the creditors of the mortgagor and subsequent *bonâ fide* purchasers or mortgagees. This is apparent from an inspection of the statute."[1] Referring to the language of the statute, the learned judge goes on to say that, giving the words their primary and legal signification, — which is the cardinal rule for the construction of statutes, — it must be construed to apply to all mortgages of property, such as is comprised under the description of "goods and chattels," as distinguished from lands; and that the court cannot interpolate any qualification of the plain language of the statute upon any supposed inconven-

[1] Rev. 705–709. This statute applies to "every mortgage or conveyance intended to operate as a mortgage of goods and chattels, — not accompanied by an immediate delivery and followed by an actual and continued change of possession."

ience arising from its application to any particular class of property which is within the operative words of the act.

Pending this suit the State of New Jersey passed a statute in reference to the registration of mortgages given by certain corporations, providing that nothing in any of the laws of the state shall be held to require the filing of record of any mortgage given by any such corporation conveying the franchises, and including chattels then or thereafter to be possessed and acquired, if such mortgage shall be duly lodged for registry as a conveyance of real estate.[1] But the court regarded the rights of the judgment creditor as fixed and vested in 1874, when the levy was made under the executions, which no subsequent legislation could take away. The Act of 1876 does not necessarily require a retrospective construction, and, therefore, the court would not allow it that effect; and, if the language used required such a construction, it could not be effective to deprive a party of prior vested rights acquired under the levy.

Another point made on the argument was that, even if the rolling stock be goods and chattels, and a mortgage thereof be required to be registered or filed by the Chattel Mortgage Act, the mortgagee having taken actual possession of such property before the judgment was recovered, the complainant's mortgage is entitled to priority over the judgment. The mortgage was made on September 14, 1869, and possession was not taken of the rolling stock by the mortgagee until January 1, 1874. The mortgage was not accompanied by an immediate delivery of the property mortgaged, but possession was taken before the judgment was recovered. But, while a subsequent purchaser or mortgagee, in order to avoid a prior mortgage for neglect to file the same, or to take possession, must have taken his title under the mortgagor in good faith, and without notice of the existence of the antecedent mortgage, a creditor may avoid it, although he has such notice. Consequently, possession taken of the mortgaged property under a prior chattel mortgage, however long postponed, will give it priority over a subsequent purchase or mortgage, if possession be taken in fact before such subsequent sale or mortgage was made. But a creditor is entitled to the benefit of the statute, whether his rights accrued before or after the mortgage; and, since his knowledge of the existence of the mortgage does not preclude him from

[1] Acts of 1876, p. 308, § 4.

availing himself of the objection that the mortgage is void, because it was not accompanied by immediate delivery of the things mortgaged, followed by an actual and continued change of possession, a subsequent taking possession by the mortgagee of the chattels mortgaged will not give validity to the mortgage as against such creditor. He is entitled to the benefit of the statute in all cases; and the mortgage is not valid against him unless it is filed according to the statute, or there was an immediate delivery and continued change of possession of the things mortgaged.[1]

165. In New York it has finally come to be the settled doctrine of the courts that the rolling stock of a railroad is personal property, and not part of the realty, and that a mortgage is not effectual to give a lien upon such rolling stock as against creditors of the company unless it be recorded as a chattel mortgage. This question was first passed upon in this state in the year 1857, by the Supreme Court, which held that rolling stock is to be deemed constructively annexed to the road, and that a mortgage of a road and its equipment is effectual against judgment creditors without being filed as a personal property mortgage.[2] In the following year other justices of the same court held that rolling stock should be regarded as personalty, and that a mortgage of it was ineffectual unless it was filed under the act relating to mortgages of personal property.[3] This decision was followed in the year 1859, by another rendered in the same court, which sustained the same view.[4] For several years there seems to have been a general acquiescence in these decisions. But in 1867 the matter was again brought in question in the Supreme Court, at special term, before Mr. Justice Sutherland, who, while holding that rolling stock does not become part of the realty, also held that a mortgage of the franchises and property of a railway, so far as the personal property covered by it is concerned, should not be deemed to be subject to the Chattel Mortgage Act.[5] At general term this decision was affirmed;[6] and

[1] Williamson *v.* N. J. Southern R. R. Co., per Depue, J. *supra*; and see Stevens *v.* Buffalo & New York City R. R. Co. 31 Barb. (N. Y.) 590; Thompson *v.* Van Vechten, 27 N. Y. 568.

[2] Farmers' Loan & Trust Co. *v.* Hendrickson, 25 Barb. (N. Y.) 484.

[3] Stevens *v.* Buffalo & New York City R. R. Co. 31 Barb. (N. Y.) 590.

[4] Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619.

[5] Bement *v.* Plattsburgh & Montreal R. R. Co. 47 Barb. (N. Y.) 104, 109.

[6] Hoyle *v.* Plattsburgh & Montreal R. R. Co. 51 Barb. (N. Y.) 45.

Mr. Justice Ingraham, delivering the only opinion, declared that he was not prepared to accede to the opinion that rolling stock is in all cases to be considered as personal property, but that, when the intent of the parties is manifest that the rolling stock should pass as part of the realty, such a construction should be given to the transaction. He held that the Chattel Mortgage Act did not apply to a mortgage executed by a railroad company of its corporate property and franchises, for such a mortgage is intended both by the legislature which authorized it, and by the parties to it, to be treated as a mortgage of the road and its accessories. Upon appeal to the Court of Appeals it was held that the rolling stock of a railway does not pass by a mortgage as part and parcel of the realty; and, also, that the law requires a mortgage of such property to be filed as a chattel mortgage when no change of possession takes place.[1] Upon the first point the court say: "Looking now at the rolling stock of a railroad, it is originally personal in its character; it is subservient to a mere personal trade — the transportation of freight and passengers. The track exists for the use of the cars rather than the cars for the use of the track. There is no annexation, no immobility from weight; there is no localization in use. The only element on which an argument can be based to support the character of realty is adaptation to use, with and upon the track. At the present time, independent companies exist owning no tracks, whose trains run through state after state on the railroad track of other companies. It is no uncommon sight to see the cars of half a dozen companies formed into a single train, and running from New York to Illinois and Missouri. It is impossible to deal with such property as part of the realty without introducing anomalies and uncertainties of the gravest character. Call cars and engines part of the realty — where shall they be taxed? Real estate is to be taxed at its site. What is the site of a railroad train running from New York to Buffalo in a day? Shall it be taxed in each town where the assessors catch sight of it rushing by at thirty miles an hour?[2] Or, if a judgment be docketed in one

[1] Hoyle *v.* Plattsburgh & Montreal R. R. Co. 54 N. Y. 314; *S. C.* 7 Am. Ry. Rep. 283. In Randall *v.* Elwell, 52 N. Y. 521, it is decided that rolling stock is personal property, and, as such, is liable to be seized and sold for taxes.

[2] To recur to the old example, — doves in a dove-cote are constructively annexed to the realty. But do they not fly through the air at the rate of thirty miles an hour, and temporarily leave the real estate to which they are annexed?

county on the line, will its lien attach on each car as it is whirled past?"

In regard to the difficulties and embarrassments thus presented by the learned judge who delivered the opinion of the court, it may be remarked that, because rolling stock is considered to be a part of the realty as between the mortgagees and creditors claiming liens upon it as personal property, it is not necessary that it should be considered realty for the purpose of taxation; or that it should be considered realty in any other relation than that existing between the railroad company and those claiming under it on the one hand, and the mortgagees on the other. It is admitted this view is well adapted and accommodated to this relation, at least so far as the mortgagor and mortgagee are concerned. Because a railway track annexed to the realty by a mortgagor becomes part and parcel of it as to the mortgagee, it does not follow that if the track were built by a tenant for use in his trade, upon leased lands, that it would become a part of the realty as to him. The right of the mortgagee to hold it as realty in the one case, and the right of the tenant to remove it in the other, would be beyond question.

166. Upon the point whether a mortgage of rolling stock, when not considered a part of the realty, is within the statute relating to the filing of personal property mortgages, the court well say that, if this case is to be excepted, it must be either on account of the character of the mortgage or of the property mortgaged, or on account of some provision of the statute law taking away the necessity of filing. "A railroad corporation does not differ from any other corporation, nor from any natural person, in respect to the general obligation to obey the laws. It is just as likely to get fraudulent credit as any other corporation, and can claim no special immunity. No distinction can be drawn to exclude a railroad corporation from the provisions of this statute which would not equally exclude every trading corporation. . . . . In respect to the character of the property mortgaged, no exemption from obedience to the law can be sustained. A railroad and rolling stock may be owned by a private individual by purchase, or may be constructed by a private individual on his own land, and he may take fare for its use such a he pleases to charge; unless he wants the public power of emi-

nent domain, or the use of public property or easements, he has no occasion to consult anything but his own will, and his own purse about constructing or running a railroad. The character of the property itself cannot, therefore, furnish any exemption from obedience to the law." [1]

Whether such a mortgage is to be filed only in the town in which the corporation has its principal place of business, or in every town through which the line of the road passes, is a question which the court, in this case, do not decide — the law requiring the filing of the mortgage in the town where the mortgagor resides, or where the property mortgaged is at the time. For many purposes, they say, a corporation is to be deemed resident where its place of business or chief office is situated, and at most it could only be deemed resident in all the towns in which any part of its line is located. But, as elsewhere noticed, the recording of mortgages of rolling stock is now regulated by statute.

167. In Ohio rolling stock is regarded as personal property. In one case [2] the court drew a broad line of distinction between the real and personal property of a railway company, including in the former the road as constructed and prepared for use, with its fixtures of timber and iron for the track, of stone and timber for bridges and culverts, its depots and structures for supplying water; and in the latter those things requisite for operating the road — locomotives, cars, and other articles and materials, some of which are consumed in the use, and require to be renewed from time to time. The line is broadly drawn between the interest in real estate and the franchises connected therewith, and the movable things employed in the use of the franchise. "The distinction," says Mr. Justice Gholson, "appears to us to be as plain as that between a farm and the implements and stock which the proper use of the farm necessarily requires. There are instances which may be put still more analogous. Take, for example, a ferry franchise. It is connected with real estate; it is itself an incorporeal hereditament, and, therefore, real estate. The use of this franchise requires boats and other movable appliances. But these, when employed in the use of the ferry franchise, do not thereby be-

[1] Per Johnson, Com'r, in Hoyle *v.* Plattsburgh & Montreal R. R. Co. 54 N Y. 314.

[2] Coe *v.* Columbus, Piqua & Indiana R. R. Co. 10 Ohio St. 372.

come a part of the real estate; they are the personal property of the owner of the ferry franchise — or, it may be, of some person to whom the ferry franchise has been demised for a term of years. Considerations of public policy and convenience have been pressed upon our attention in connection with the question under examination. It may be true that a railway corporation holds its property, in a certain sense, as a public trust — to answer the purpose of a public highway, the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involves obligations to individuals; and, to meet those obligations, the property of the corporation must in some form be liable. The question is, In what form? Shall it be in the ordinary legal form applicable to the property of individuals, or shall peculiar rules be introduced, which may have the effect to delay creditors and operate as a shield to protect property from their just demands?" In conclusion, the court say that the interest of the owners of the road must be the reliance for its continued operation; that it is not the policy of the state, nor would it be just to individuals, that the power of the court should be invoked to enable an insolvent corporation to operate a railroad by protecting its property from the claims of creditors — those, it may be, who have performed for it labor, or have suffered losses or sustained injuries by the misconduct of its agents.

168. In New Hampshire[1] the rolling stock of railroads, like other personal property, is held liable to attachment and levy when not in actual use. It was argued by counsel for a railroad company whose property was attached, that, such property being necessary to enable the corporation to discharge its public duties, it vested in the corporation in trust for the public; that the franchise of the corporation is the principal thing, to which the track, depots, engines, cars, and the like, are mere incidents, and that all these constitute one entire thing, so connected that the cars and engines cannot be severed from their connection by an attachment

[1] Boston, Concord & Montreal R. R. Co. *v.* Gilmore, 37 N. H. 410. In the earlier case of Pierce *v.* Emery, 32 N. H. 484, the Supreme Court of this state had held that there was nothing in the nature of the business of a railroad company, or in its relations to the public, which prevented it from making a valid mortgage of its personal property not affixed to the road, though used in operating it. See § 125.

or seizure on execution, and held as security or sold and applied as personal property ordinarily may be, for the payment of the corporate debts. But the court say the idea that property, either real or personal, may become a mere incident to a franchise, so that the franchise and property shall constitute an entire thing, is not found in any of the books of the common law. A ferry is mentioned as an instance of a franchise, for the use of which, and for the discharge of its public duties in the transportation of passengers and goods, its boats are wholly indispensable; yet no case is found where it has been claimed that such boats are exempt from seizure in discharge of the owner's debts. "Considering, then, that it is not necessary for the discharge of the public duties of railroad corporations that they should be the owners of cars or engines — many such roads being operated with the cars of other corporations; that it is a matter of great uncertainty what articles of the personal property of such corporations are necessary for the discharge of their public duties; that no means exist by which it can be determined what is necessary or otherwise; that it must be very difficult for courts to lay down any definite rule by which officers can be guided, who, in all such cases, must decide at their peril, — it seems to be neither judicious nor expedient to establish an exemption of this kind, unless it is done by the direct action of the legislature, who can provide the proper rules and safeguards for the safety of officers as well as of parties."

169. In Massachusetts it has been held that under a mortgage of a railroad its locomotives and cars, together "with all improvements made upon such property, and all additions thereto, by adding new locomotives, cars, and other things," cars subsequently purchased by the corporation are included, although the mortgagees had not taken possession for foreclosure; but the decision was based in part upon the fact that the mortgage was confirmed and ratified by legislative act, and thus effect was given to all parts of it, including the provision as to after-acquired machinery and cars. This mortgage was duly recorded, and thus, say the court, by means of the record and the statute, the lien thereby created was duly notified to all persons having dealings with the corporation; and therefore a creditor of the corporation could not make a valid attachment of cars subsequently purchased.[1]

[1] Howe *v.* Freeman, 14 Gray (Mass.), 566

170. In conclusion, upon this part of the subject it may be said that, while there are many and strong arguments for holding that rolling stock is part of the realty, — and this view seems to have the support of the United States courts, — the weight of authority in the state courts seems to be against that position. There is, however, no hope that any uniform and settled rule upon this subject will soon be arrived at by the courts without the aid of legislative enactments. It is of the highest importance that the validity of mortgages intended to embrace the rolling stock and other personal property of a railroad should not be left to the uncertain decision of the courts; for in the present state of the law, it must at least be regarded as uncertain how the question would be determined by any court not bound by a precedent or by statute,

IV. *Constitutional and Statutory Provisions regarding Rolling Stock.*

171. In several states there is now a constitutional provision "that rolling stock and all other movable property belonging to any railroad company or corporation shall be considered personal property, and shall be liable to execution and sale in the same manner as personal property of individuals, and the general assembly shall pass no law exempting any such property from execution and sale." This provision was first made a part of the fundamental law of Illinois[1] in 1870, where the courts had previously declared rolling stock to be fixtures. This provision has since then been adopted in the same words in Missouri,[2] Arkansas,[3] Nebraska,[4] Texas,[5] and West Virginia.[6]

The general purpose of this constitutional provision is, undoubtedly, to enable general creditors of railroad corporations, whose claims may be small, to find property out of which their claims may be satisfied. When the franchise and property of a railway company, and perhaps its tolls as well, are all covered by mortgage, the general creditors are practically left without remedy against it; for, even if there be any value in the property above the mortgage, it is extremely difficult for a general creditor to reach and apply the surplus to the payment of his claim, while the expenses of the proceedings for this purpose are very large.

[1] Const. 1870, art. xi. § 10.
[2] Const. 1875, art. xii. § 16.
[3] Const. 1874, art. xvii. § 11.
[4] Const. 1875, art. xi. § 2.
[5] Const. 1876, art. x. § 4. See, also, General Railroad Act 1876, ch. 97, § 24.
[6] Const. 1872, art. xi. § 8.

This provision, however, would not prevent the mortgaging of rolling stock as personal property; and a railroad mortgage recorded in accordance with the law regulating the recording of chattel mortgages would effectually cover such property. Moreover, as already noticed, this provision does not change the rule that a mortgage may be made to cover after-acquired rolling stock.[1]

As already intimated, it seems to be a matter of the highest importance to mortgage bondholders that the different states should, by statute, make it certain where a mortgage of a railroad, including its equipment, should be recorded in order to make the lien effectual as to the rolling stock and other like property. In those states in which the laws require that mortgages of personalty shall be filed for record in the office of the clerk of the city or town in which the mortgagor resides, it may be sufficient to record a railroad mortgage only in the city or town where the railroad corporation has its principal office or place of business.[2] That, for most purposes, is regarded as the place of residence of the corporation.[3] It would be an extreme inconvenience to the mortgagee, and a source of great danger of loss, if he is in such cases required to record his mortgage in several hundred towns, it may be, through which the mortgaged road may pass. The supposition that a railroad corporation is a resident of the place where its principal office is located, rather than a resident of all the towns through which its line of road passes, has been acted upon frequently in the matter of recording railroad mortgages; but without positive legislation upon the subject, or legal decision of this point, there is just enough uncertainty about it to make the position of a mortgagee, who looks to the rolling stock and other personal property embraced in his mortgage as a material part of his security, quite uncomfortable. The legislation that is demanded upon this subject is that which has been adopted in several states, namely, the making of the record required for the protection of the real estate included in the mortgage, effectual also as a record of the personal.

[1] Scott *v.* Clinton & Springfield R. R. Co. 6 Biss. 529.

[2] So provided by statute in Maine (Rev. Stat. 1871, ch. 91, § 1).

[3] As, generally, for taxation, the place of business of the corporation is considered the *situs* of its personalty. Cooley on Tax. 273, and cases cited; City of Dubuque *v.* Illinois Central R. R. Co 39 Iowa, 56; State *v.* Severance, 55 Mo. 378; Pacific R. R. Co. *v.* Cass County, 53 Mo 17; Dillon Munic. Corp. § 629.

Of course, when a subsequent incumbrancer has actual notice of a prior mortgage, and of the fact that its terms embrace rolling stock, he cannot object that it was not filed as a chattel mortgage, because the notice is equivalent to such filing.[1]

172. In California[2] locomotives, engines, and other rolling stock of a railroad, are enumerated among the articles of personal property of which a mortgage may be made. But mortgages of personal property are recorded in the office of the county recorder, in which mortgages of real property are also recorded; only they must be recorded in books kept for personal mortgages exclusively, and must be recorded in the county in which the mortgagor resides, and also in that in which the property is situated, or to which it may be removed. Personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located.

173. In Connecticut[3] it is provided by statute that, whenever any railroad company has mortgaged its railroad, pursuant to law, to secure its bonds, and has included in said mortgage all or any part of its rolling stock, locomotives, and cars, whether those owned by it at the date of said mortgage or those thereafter to be acquired by it for use upon said railroad, or both, such mortgage shall be deemed valid and effectual as respects all the property therein included as aforesaid; and may be foreclosed in the same manner as ordinary mortgages of real estate; and the record thereof in the office of the secretary of state shall be a sufficient record and notice to protect the title under the mortgage, notwithstanding such company may remain in possession of all or any part of the mortgaged property.

174. In Dakota Territory[4] it is provided that any mortgage or deed of trust made upon the lands, road, or other property of a railroad corporation shall bind and be a valid lien upon all the property mentioned in such deed or mortgage, including rolling stock; and the purchaser under foreclosure of such mortgage or

[1] Benjamin *v.* Elmira, Jefferson & Canandaigua R. R. Co. 54 N. Y. 675.

[2] Civil Code, §§ 2955, 2959, 2961.

[3] Public Acts 1877, ch. 38.

[4] Rev. Code 1877, p. 304.

trust deed shall have and enjoy all the rights of a purchaser on execution sale. Such mortgages or deeds of trust may by their terms include and cover, not only the property of the corporation making them at the time of their date, but property, both real and personal, which may thereafter be acquired by them, together with all the material and property necessary for the use and operation of such roads, and are as valid and effectual as if the property were in possession at the time of the execution thereof. Such mortgages or deeds of trust must be recorded in the office of the register of deeds of each organized county through which such road mortgaged or deeded may run in this territory, or wherever it may hold lands included in such mortgages or deeds of trust, and are notice to all the world of the rights of all parties under the same; and for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, the rolling stock, personal property, and material necessary for operating the same shall be deemed a part of the road, and such mortgages and deeds so recorded have the same effect, both as to notice and otherwise, as to the personalty, that they have upon the real estate covered by them.

175. In Florida the general law of 1874, for the incorporation of railroads and canals, provides that a railroad company may make such provisions in any trust deed or mortgage for transferring the railroad, the rolling stock, and other furniture and appurtenances, in connection therewith, or which shall thereafter belong to it as security for any bonds, debts, or sums of money secured, as the company may deem proper. Such trust deed or mortgage may, by the direction of the board of directors of such company, be recorded in the office of the secretary of state, in a book kept for that purpose, and when so recorded, it is evidence and notice to all persons of its existence and lawful execution without its being recorded elsewhere in the state; and when so recorded it has the same effect as if recorded in the several counties through which the road may be built, and is notice to the same extent and effect as if so recorded.[1] All rolling stock used in connection with a railroad is declared to be fixtures, and is subject to the lien of any mortgage of the road.[2]

[1] Acts of 1874, ch. 1987, § 9, par. 10, and § 31.

[2] Ib. § 31.

176. In Iowa[1] it is provided that any mortgage of the real and personal property of a railroad company, whether then owned by it or afterwards acquired, when duly executed and recorded in the office of the recorder of each county through which the railway of the corporation may run, or in which any property mortgaged may be situated, shall be notice to all the world of the rights of all parties under the same; and for this purpose, to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, the rolling stock and personal property of the company properly belonging to the road, and appertaining thereto, shall be deemed a part of the road, and such mortgages and deeds so recorded shall have the same effect, both as to notice and otherwise, as to the personalty, that they have upon the real estate conveyed by them.

177. In Massachusetts[2] it is provided that any railroad company may issue bonds for any lawful purpose, and may mortgage or pledge as security for the payment of such bonds any part, or all of its road, equipment, or franchise, or any part, or all of its property, real or personal.

It is provided that cars and engines in use upon railroads shall not be attached upon mesne process in any suit within forty-eight hours previous to their fixed time of departure, unless the officer shall have first demanded other property equal in value to the *ad damnum* in the writ upon which to make such attachment, and such demand has been refused or neglected.[3]

178. In Minnesota,[4] by a statute enacted in 1868, mortgages or deeds of trust of railroad companies may, by their terms, include and cover, not only the property of the companies making them at the time of their date, but property, both real and personal, which may thereafter be acquired by them, and they are as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof. Such mortgages or deeds of trust recorded in the office of the register of deeds of each county

[1] Code 1873, §§ 1284, 1285. Yet the rolling stock seems to be regarded as personal property. City of Dubuque *v.* Illinois Central R. R. Co. 39 Iowa, 56, 86, per Beck, J.

[2] Acts 1874, ch. 372, § 49; 1875, ch. 58.

[3] Act 1875, ch. 144, § 1.

[4] 1 Stat. at Large 1873, p. 431; Act March 5, 1868. As to record in the office of the secretary of state having same effect, see Act March 6, 1867; 1 Stat. at Large, 430.

through which the road mortgaged or deeded may run, or wherever it may hold lands, will be notice to all the world of the rights of all parties under the same; and for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, the rolling stock and personal property of the company properly belonging to the road and appertaining thereto are deemed a part of the road, and such mortgages and deeds so recorded have the same effect, both as to notice and otherwise, as to the personalty, as upon the real estate covered by them.

179. In Montana Territory [1] it is provided that any railroad corporation may mortgage its property and income; and, if the mortgage shall so provide, it shall be and remain a valid lien upon all of the property of the company of whatever kind then existing, or that may thereafter be by it acquired, irrespective of the law now in force relating to chattel mortgages, and the same shall be taken, held, and enforced in the same manner as mortgages upon real estate now are held and enforced.

180. In Nebraska [2] the general railroad law provides that mortgages and deeds of trust of railroad companies shall be recorded in the office of the county clerk of each organized county through which the mortgaged road may run, or in which it holds lands, and shall be notice to all the world of the rights of all parties under the same; and for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust, the rolling stock, personal property, and material necessary for repairing the road of the company, belonging to said road, or appertaining thereto, shall be deemed a part of the road, and such mortgages and deeds of trust so recorded shall have the same effect, both as to notice and otherwise, as to the real estate covered by them.

181. In New Jersey [3] a law passed in 1876 provided that nothing in any of the laws of the state shall be held to require the filing of record in the clerk's office of any county of any mortgage given by any such corporation, conveying the franchises thereof, and whereby, also, any chattels then or thereafter to be possessed and acquired by such corporation shall purport to be mortgaged;

[1] Laws 1873, p. 102.

[2] Gen. Stat. 1873, ch. 11, § 120.

[3] Laws 1876, p. 308, § 4; 2 Rev. 1877, p. 924, § 82.

provided, that such mortgage shall be duly lodged for registry according to the laws regulating the conveyance of real estate.

182. In New York[1] it was, in 1868, provided that it shall not be necessary to file as a chattel mortgage any mortgage which has been, or may be, executed by any railroad company upon its real and personal property, and which has been, or shall be, recorded as a mortgage of real estate in each county in or through which the railroad runs.

183. In Ohio[2] it is provided that in all cases where a mortgage has been, or may hereafter be, executed upon any portion of the personal and real property of any railroad company within the state, by proper officers, to secure the payment of any loans of money, or advances of material or labor made to said company, it shall be a sufficient record of the same to have the same recorded in the office of the recorder of deeds in each of the counties in which said real or personal property may be situated or employed, and said mortgage so recorded shall be held to be a good and substantial lien from the date of the record of the same in each county where the same is recorded, as well upon the personal as the real property of said company.

184. In Vermont[3] all mortgages of railroad franchises, furniture, cars, engines, and rolling stock of any kind, when properly executed and recorded, are effectual to vest in the mortgagee a valid mortgage interest in, and lien upon, all such property, without delivery or change of possession; and, for the purpose of mortgage, all such property is deemed part of the realty. Such mortgage is recorded in the office of the county clerk of each county through which the road passes, instead of the offices of the town clerks; and when so recorded, it has the same effect as if recorded in the several offices of the town clerks of the towns through which such road passes. It is provided, however, that such rolling stock may be attached by any person having a claim against the company for an injury sustained on the road by reason

[1] Laws 1868, ch. 779, § 1; 3 Fay's Dig. of Laws, 236; 2 R. S. 1875, p. 555, § 115.

[2] 1 Rev Stat. 1860, p. 322, passed Feb. 9, 1853.

[3] Gen. Stat. 1870, ch. 28, §§ 100–102; Acts 1851, No. 57, § 1, and 1856, No. 29, §§ 1, 2.

of any neglect of the corporation, or for services rendered or materials furnished for the purpose of keeping the road in repair or in running the same, or for any liabilities as common carriers, or for the loss of any property while in the possession of the corporation.

185. **In West Virginia**[1] the rolling stock, and all other movable property belonging to any railroad company, is considered personal property, and is liable to execution and sale in the same manner as the personal property of individuals. Mortgages, however, of real property and mortgages of personal property are recorded in the same county registry and under the same laws.[2]

186. **The general railroad laws of Wisconsin**[3] provide that railway companies may, in mortgages or trust deeds, make such provisions for pledging or transferring their property, including rolling stock and appurtenances in connection with the railroads or which shall thereafter belong to them, as security for any bonds, debts, or sums of money secured, as such companies may think proper. Any deed of trust or mortgage of any locomotives, tenders, cars, or other property used or intended to be used as rolling stock or equipment on any railroad, and any discharge thereof acknowledged in such manner as would entitle a deed of real estate to be recorded, is sufficiently recorded or filed by filing a copy in the office of the secretary of state; and a certificate of such filing indorsed thereon by the secretary of state is evidence thereof; and such deed of trust or mortgage is valid and effectual as against the creditors of the company, or subsequent purchasers or mortgagees in good faith, without any further proceeding whatsoever. All rolling stock used in connection with a railroad is declared to be fixtures, and is subject to the same lien as is created by such trust deed or mortgage upon the real property of such railroad company; and every such deed of trust or mortgage recorded in the office of the secretary of state, in a proper book kept for the purpose, has the same effect as if recorded in the several counties through which the road may be built; and such record is notice of the lien to all persons interested. But this statute makes rolling

[1] Act April 3, 1873; ch. 88 of Acts 1872–1873.

[2] Code 1870, p. 74, §§ 5, 7.

[3] Laws 1872, ch. 119, §§ 39 & 40; Laws 1877, ch. 144, § 1; and see Railroad Co. *v.* James, 6 Wall. 750.

stock a fixture only for the purpose of enabling railroad corporations the more readily to give valid liens and mortgages upon their property. It does not contemplate that, in respect to all the legal remedies of parties, a car or locomotive should be treated as real estate; and it is accordingly held that such property is liable to seizure and sale for delinquent taxes as personal property.[1]

187. In Great Britain the rolling stock and personal property essential to the operating of railways are by statute protected from levy by execution.[2] The act provides that the engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed, under the direction of the court, in payment of the debts of the company, and otherwise, according to the rights and priorities of the persons for the time being interested therein; and on the payment of the amount due to every such judgment creditor as aforesaid the court may, if it think fit, discharge such receiver or such receiver and manager.

If in any case where property of a company has been taken in execution a question arises whether or not it is liable to be so taken, notwithstanding this act the same may be heard and determined on an application by either party, by summons in a summary way to the court out of which the execution issued, and such determination is final and binding.

It is also provided that companies unable to meet their engagements may file a "scheme of arrangement" in chancery, which,

[1] Chicago & Northwestern Ry. Co. *v.* Borough of Ft. Howard, 21 Wis. 44.

[2] The Railway Companies Act 1867, 30 & 31 Vict. ch. 127; and see 30 & 31 Vict. ch. 126, as to Scotland. These acts made perpetual in 1875, 38 & 39 Vict. ch. 31; and see 35 & 36 Vict. ch. 50.

when assented to by a certain proportion of the mortgagees and shareholders, and confirmed by the court, is binding and effectual, and has like effect as if it had been enacted by parliament.

Prior to the passing of this act, it was held that the mortgagee of an undertaking could not have an injunction against judgment creditors who were about to take under an *elegit* the lands of the company;[1] for a mortgage of the undertaking does not ordinarily, and unless the intention is apparent by the deed, pass the land itself, or constitute any charge upon it.[2]

[1] Perkins *v.* Deptford Pier Co. 18 Sim. 277.

[2] Wickham *v.* New Brunswick, &c. Ry. Co. L. R. 1 P. C. 64; and see Hart *v.* Eastern Union Ry. Co. 7 Exch. 246, 265; Eastern Union Ry. Co. *v.* Hart, 8 Exch. 116; Perkins *v.* Pritchard, 3 Railw. & Canal Cas. 95. In Lower Canada, the rolling stock of a railway is held to be a part of the realty, and as such not liable to seizure under a writ of execution *de bonis*. Grand Trunk Ry. Co. *v.* Eastern Townships Bank, 10 Lower Can. Jur. 11; *S. C.* 16 Ib. 173.

CHAPTER VI.

MORTGAGE BONDS OF CORPORATIONS.

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IV. Remedies upon corporate bonds, 217–221.

I. *Formalities in making and issuing Bonds.*

188. General statement. — An ordinary money bond is an instrument under seal, which contains an acknowledgment of the loan and an agreement to repay the same upon the terms stated. Annexed to it, and forming a part of the bond originally, there are usually interest coupons or warrants for each instalment of interest accruing during the time the bond has to run. An ordinary bond does not itself create any charge or lien upon the property of the company, or give the holder any priority over any other creditor; but such a bond is usually secured by a mortgage or deed of trust, which creates a charge, and gives all the holders of the bonds secured a priority over all who may subsequently become creditors of the company. There are other bonds not secured by mortgage, which are a charge upon property by force of statutes; of these something has already been said.[1] There are other bonds which are wholly unsecured; and of these and like securities something will be said in a subsequent chapter.[2]

189. A bond implies a seal. — A corporate seal may consist merely of an impression of the seal of a corporation, indented or stamped into the substance of the paper of a printed bond, without the use of wax, wafer, or other adhesive substance.[3] A

[1] See §§ 72–83.

[2] See Chapter viii.

[3] Royal Bank of Liverpool *v.* Grand Junction R. R. & Depot Company, 100 Mass. 444; Hendee *v.* Pinkerton, 14 Allen (Mass.), 381; Allen *v.* Sullivan R. R. Co. 32 N. H. 446; Chilton *v.* People, 66 Ill. 501; Jones on Mortgages, § 128.

corporate seal so impressed by the printer, by direction of the officers of the corporation, who adopt his act by signing and issuing the bond so prepared, makes the instrument valid as the bond of the corporation. In states where the distinction between sealed and unsealed instruments is inflexibly preserved, such a sealing is unquestionably valid; but in such states a fac-simile of the corporate seal printed with ink on the paper is not a valid seal. There is no definition of a seal, and none can be given, which would make this a seal. The printed form of a seal is nothing more than a scroll, and to adopt it as a seal would be to do away with the distinction between a sealed and an unsealed instrument.[1]

A sealed instrument conclusively imports a consideration; consequently it is no defence to an action at law upon the bonds of a railroad company that their delivery by the company was merely gratuitous, and without the payment of value for them; or that the company delivered them as collateral security for the payment of other bonds. The corporation can avail itself of the fact that the bonds are held as collateral only by paying in full the amount of its real indebtedness.[2]

A corporate seal affixed to an instrument is also *primâ facie* evidence that it was placed there by proper authority; or, in other words, that the instrument is the act of the corporation.[3]

The fact that such an instrument is issued under the seal of the corporation is now regarded as of no consequence in respect to its negotiability. This formality signifies that the corporation has duly executed the instrument. A seal does not make such an instrument a deed, or render it necessary that a transfer of it should be by a sealed instrument; but the holder may transfer it by the customary parol transfer, just as if it belonged to the class of simple contracts.[4]

190. Corporations generally impose upon their officers certain formalities in the preparation and issue of their bonds or other evidences of debt, and it becomes an important inquiry

[1] Bates *v.* Boston & N. Y. Central R. R. Co. 10 Allen (Mass.), 251.

[2] Royal Bank of Liverpool *v.* Grand Junction R. R. & Depot Co. 100 Mass. 444.

[3] City of Memphis *v.* Adams, 9 Heisk. (Tenn.) 518; Levering *v.* Mayor, &c. 7 Humph. (Tenn.) 553.

[4] Goodwin *v.* Robarts, L. R. 10 Ex. 337; General Estates Co. *in re*, L. R. 3 Ch. 758; Imperial Land Co. of Marseilles *in re*, L. R. 11 Eq. 478.

how far these directions are binding upon persons who purchase bonds issued in disregard of such requirements. In general, it may be said that whenever the obligations issued purport to be the obligations of the corporation, and are so in fact, the omission of any preliminaries required by the articles of association, or by the by-laws of the corporation, cannot affect a *bonâ fide* purchaser without notice. Ordinarily the purchaser has no means of knowing what formalities are required as between the corporation and its officers, and no means of knowing whether such requirements have been fulfilled. A director or other officer of the corporation standing in such relation to the affairs of the corporation that he would be presumed to know both what the requirements are, and whether they have been observed, could not, of course, take the obligations of the corporation, with all the rights of a third person purchasing without notice. But a purchaser of a negotiable obligation from such officer for value, unacquainted with the circumstances under which it was originally issued, would have all the rights of a *bonâ fide* purchaser.[1]

Again, while a purchaser of a corporate security is bound to know whether the corporation had power to issue it at all, yet, when such authority depends upon a statute, a requirement as to the manner of exercising the power, as for instance that a vote of the stockholders or a resolution of the directors shall first be passed, may be presumed to have been complied with. "Third parties dealing with a corporation are bound to know the law; that is, they are bound to take notice of the extent of its powers, but they have a right to assume, in the absence of anything suggesting inquiry, that it has proceeded regularly in the execution of its powers."[2] A requirement of statute that the act of a corporation in issuing its obligations shall be authorized or ratified by a vote of its stockholders is a requirement for their protection, and relates to the mode and manner of executing the power rather than to the existence of the power; and the purchaser has the right to presume that the corporation has done its duty and proceeded regularly in the execution of its power.

191. Formality of a stockholder's vote. — In a leading Eng-

[1] Weff *v.* Commissioners of Herne Bay, L. R. 5 Q. B. 642.

[2] Connecticut Mut. Life Ins. Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co. 41 Barb. (N. Y.) 9.

lish case upon this subject,[1] it appeared that the directors of a joint stock company were authorized by the deed of settlement to borrow such sums of money, within a certain limit, as the company should authorize by a resolution passed at a general meeting of the company. At such a meeting the company, instead of authorizing a definite loan, authorized the directors to borrow at their discretion. In suit upon a bond issued by the directors the company was held liable, upon the ground that it was of no consequence whether the resolution was or was not sufficient authority to the directors to borrow, and of no consequence, even, whether there was any resolution at all; inasmuch as a person dealing with the company has a right to presume that the company, which has put forward the directors as authorized to borrow, has taken every step requisite to empower it to borrow.

So in a case in Victoria, where a mining company was empowered to borrow money and mortgage its property upon a vote of the stockholders *and the directors*, it was held that the company was liable upon a loan obtained by the directors without such vote, for the lender was justified in assuming that there had been a meeting and vote of the shareholders in the manner directed.[2]

Inasmuch as a purchaser is not concerned with a requirement for the holding of corporate meetings to authorize the issuing of corporate obligations, for a still stronger reason he is not concerned with requirements respecting the preliminaries of such meetings, such as the publication of notices, or with regulations as to the manner of conducting such meetings.[3]

Aside from the consideration, whether a requirement by statute or by charter that the bonds of a corporation shall be issued only upon a vote of the stockholders at a general meeting be regarded as a directory formality or an imperative one, the corporation is estopped by a waiver of such formality. Thus, where bonds issued in disregard of such formality were treated by the company as good, a stockholder who had attended meetings where the bonds

[1] Royal British Bank *v.* Turquand, 6 E. & B. 248, 827. See, also, Colonial Bank of Australasia *v.* Willan, L. R. 5 P. C. 417; Agar *v.* Athenæum Life Ins. Co. 3 C. B. N. S. 725; Lowe *v.* London & North Western Ry. Co. 18 Q. B. 632; London & North Western Ry. Co. *v.* M'Michael, 5 Ex. 855; Prince of Wales, &c. Co. *v.* Harding, El., Bl. & El. 183; Pickard *v.* Sears, 6 Ad. & El 469; Freeman *v.* Cooke, 2 Ex. 654, 663; Eastern Counties Ry. Co. *v.* Hawkes, 35 Eng. L. & Eq. 8; 5 H. L. 331.

[2] Tyson's Reef Co. *in re*, 3 W. W. & A. B. Cases at Law, 162.

[3] Fountaine *v.* Carmarthen Ry. Co. L. R. 5 Eq. 316; Worcester Corn Exchange Co. *in re*, 3 De G., M. & G. 180.

were treated as good, upon subsequently filing a bill to restrain the company from redeeming the bonds, was held to be estopped from contesting their legality.[1]

192. **A special and unusual requirement in respect to the execution of a corporate obligation,** such for instance as that it shall be signed or countersigned by a particular officer, is a directory formality which does not affect the right of one who has purchased in good faith without knowledge of the informality.[2]

193. **In like manner requirements respecting the appointment or election of directors** or other officers of the corporation cannot affect the obligations of the company in the hands of *bonâ fide* holders for value.[3] The directors and other officers of the company who are found acting as such are presumed to be legally appointed.[4] It is well settled that if a corporation holds out to the world any one as a duly qualified officer, or acquiesces in his assumption to be such officer, it is as much bound as if he had been elected and qualified with every prescribed formality. The true legal ground of the obligation is that of estoppel.

194. **Knowledge of the irregularity.** — Inasmuch as the reason upon which this class of cases depends is that a person dealing with a corporation does not know, and has no adequate means of knowing, whether the preliminaries and formalities to the proper execution of an instrument have been complied with, it follows that when the irregularity is one which appears upon the face of the instrument itself, the purchaser is bound to take notice of it. This qualification is pointed out by Page-Wood, V. C., in a leading chancery decision:[5] "There is no doubt an important

[1] Zabriskie *v.* Cleveland, Columbus & Cincinnati R. R. Co. 23 How. 381, 398.

[2] Brice on Ultra Vires, 2d Eng. ed. 643; Prince of Wales Life Assurance Co. *v.* Harding, E., B. & E. 183; Land Credit Co. of Ireland *in re*, L. R. 4 Ch. 460; Hill *v.* Manchester W. Works Co. 5 B. & A. 866; Allen *v.* Sea Fire & Life Ins. Co. 9 C. B. 574; Bargate *v.* Shortridge, 5 H. L. 297; Norwich Yarn Co. *in re*, 22 Beav. 143.

[3] Bank of U. S. *v.* Dandridge, 12 Wheat. 64; Zabriskie *v.* Cleveland, Columbus & Cincinnati R. R. Co 23 How. 381; Corrugi *v.* Atlantic Fire Ins. Co. 40 Ga. 135; 2 Am. R. 567; Township of Brock *v.* Toronto & Nipissing Ry. Co. 17 Grant (Upper Canada Ch.), 425.

[4] Anderson *v.* Duke, &c. Gold Mining Co. 1 Australian Jurist, 161; County Life Ass. Co. *in re*, L. R. 5 Ch. 288.

[5] Athenæum Life Assurance Soc. *in re*, 4 K. & J. 549. See, also, North Hallenbeagle Mining Co. *in re*, L. R. 2 Ch. 321; Fountaine *v.* Carmarthen Ry. Co. L. R.

distinction to be drawn, and it is drawn, in the case of the *Royal British Bank* v. *Turquand*, between that which on the face of it is manifestly imperfect when tested by the requirements of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with. Thus where the deed requires certain instruments to be made under the common seal of the company, every person contracting with the company can see at once whether that requisition is complied with, and he is bound to do so; but where, as in the case I have last referred to, the conditions required by the deed consist of certain internal arrangements of the company, — for instance resolutions of meetings and the like, — if the party contracting with the directors finds the acts to be within the scope of their power under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed, he is not bound to inquire whether the resolutions have been duly passed or the like; otherwise he would be bound to go back, and to inquire whether the meetings have been duly summoned, and so ascertain a variety of other matters into which, if it were necessary to make inquiry, it would be impossible for the company to carry on the business for which it is formed."

All that has been said upon this subject is premised of instruments which on their face purport to be the obligations of the corporation to be charged and to be duly executed; for a corporation is not liable upon instruments which do not purport to be made by it, even in the hands of a *bonâ fide* holder for value.[1]

Moreover a distinction is to be observed between transactions which are within the general scope of a corporation without the aid of statutory authority, and those which depend altogether upon such authority for their validity. Requirements in the case of the former might be regarded as directory merely, which in the case of the latter might be regarded as conditions precedent to the exercise of the authority, or imperative formalities.

195. The bonds of a railroad company are not rendered void in consequence of being secured by an invalid mortgage, one for instance which the company had no power to execute. A corporation, like a natural person, has the right to carry on its legiti-

5 Eq. 316; Native Iron Ore Co. *in re*, L. R. 2 Ch. D. 345.

[1] Serrell *v.* Derbyshire, &c. Ry. Co. 9 C. B. 811; on Appeal, 10 C. B. 910.

mate business by all legal and necessary means not prohibited by law or by its charter. If it has the power to borrow money, it may issue its bonds for the money borrowed. In an action upon such contract obligation the mortgage securing it is of no consequence in any way. A defect in a mortgage does not invalidate the mortgage debt, but only the security for it; and a want of power to make the mortgage does not affect the obligation of the bonds secured. Having a right to issue the bonds, the company is liable upon them without regard to the mortgage. A recital on the bonds themselves that they were "issued by the company in accordance with its charter to the amount of $500,000, and that the mortgage thereon receipted had been duly executed," does not prevent a recovery upon the bonds, though the company had no power to grant the mortgage.[1]

A provision in a mortgage not contained in the bonds secured by it, making the principal sum due after a default in the payment of interest for a certain time, does not enable a holder of the bonds in a suit upon them to recover the principal upon such default. Such provision has reference only to making the principal due in case of the foreclosure of the mortgage.[2]

196. **A certificate indorsed on a mortgage bond** of a corporation, stating that such bond is included in the mortgage, is to be construed with the mortgage and the bond as a part of the same security.[3]

A certificate on the face of mortgage bonds signed by the mortgage trustees, that the bonds are secured by a first mortgage to them in trust for the bondholders, is a representation binding upon the company when it has delivered the bonds in that state; but it does not of itself raise an absolute presumption that a purchaser relied upon the certificate. Consequently, in an action upon a note given to the company in part payment for such a bond, the question should be submitted to the jury whether the purchaser accepted the bonds relying to any extent upon the certificate. The certificate is no part of the bond, and the representation contained in it does not control the obligation of the bond. It is an

[1] Philadelphia & Sunbury R. R. Co. *v.* Lewis, 33 Pa. St. 33.

[2] Mallory *v.* West Shore Hudson River R. R. Co. 3 Jones & S. (N. Y.) 174.

[3] Benjamin *v.* Elmira, Jefferson & Canandaigua R. R. Co. 49 Barb. (N. Y.) 441.

affirmation that the estate mortgaged is subject to no prior similar incumbrance. This affirmation does not constitute a warranty unless intended to have that effect. It is a representation in relation to a material fact which may have influenced the purchaser, but whether it did so is to be determined by the jury upon all the circumstances attending the transaction.[1]

II. *Negotiability of Corporate Bonds.*

197. Railroad bonds are usually made payable to the trustee named in the mortgage, or bearer, or to bearer generally, and they pass by delivery from hand to hand. They are in fact mere bills or notes, and as strictly negotiable as bank bills. Though called bonds, the word does not, *ex vi termini*, imply a contract under seal. As a matter of fact such bonds are not generally under seal. If executed under seal, it might become necessary for the courts to disregard that incident, in order to give them that legal operation which the unwritten law of commerce has already given them. Therefore in an action upon such an instrument, although it be described as a bond, it may be declared upon the same as a bill of exchange or promissory note, as an instrument importing a consideration.[2]

Debenture bonds in the form used in England when made payable to bearer, are held to pass, like bills and notes, free from all equities existing against the original holders.[3] If such bonds are made payable to a person named or order, after indorsement by the payee, they become negotiable like bonds payable to bearer.[4] The decisions are, however, conflicting; and indeed until of late years such bonds were regarded as *primâ facie* non-negotiable, and, therefore, subject to the equities existing between the corporation and the original holders.[5] The latest decisions favor the proposition that such instruments are, in equity at least, negotiable, free from the equities primarily attached to them.[6] In the

[1] Edwards *v.* Marcy, 2 Allen (Mass.), 486.

[2] Ide *v.* Passumpsic & Conn. River R. R. Co. 32 Vt. 297.

[3] Imperial Land Co. of Marseilles *in re*, 11 Eq. 478; 4 Cox's Joint Stock Cas. 241; Blakely Ordnance Co. *in re*, L. R. 3 Ch. 159.

[4] General Estates Co. *in re*, L. R. 3 Ch. 758. See, also, Agra & Masterman's Bank *in re*, L. R. 2 Ch. 391.

[5] See Athenæum Life Ass. Society *v.* Pooley, 3 De G. & J. 294; Natal Investment Co. *in re*, L. R. 3 Ch. 355; Rhôs Hall Co. *in re*, 17 W. R. 343.

[6] Brice on Ultra Vires, 2d ed. 304.

case of the Imperial Land Company of Marseilles,[1] which had issued debenture bonds payable to bearer, and had sold them in open market, upon the winding up of the company the question arose whether equities which were admitted to exist in favor of the company against the parties to whom they were originally issued should be admitted as against the present holders. Vice Chancellor Malins, after reviewing the authorities, said: "I am clearly of opinion that, whether they were promissory notes, or bonds, or debentures, it was within the powers conferred upon the directors to issue them. Are they then promissory notes or debentures? or does it make any difference which they are in the result? My opinion is that, whichever they are, the result is the same, because they in any case make a contract by which the company have bound themselves to pay, not to any particular person, but to any person who may be the bearer, the sum appearing to be due upon their face."

Scrip certificates issued by a foreign government or by a corporation on negotiating a loan promising to bearer, after all instalments have been duly paid, a bond for the amount paid, with interest, are by custom of all the stock markets of Europe negotiable instruments, and pass by mere delivery to a *bonâ fide* holder for value. This is the English law. Any person taking such scrip in good faith obtains a title to it independent of the title of the person from whom he took it.[2]

198. A bond, although a sealed instrument, when made payable to bearer or holder, or order, is negotiable, with all the ordinary properties of a negotiable instrument.[3] Mr. Justice

[1] L. R. 11 Eq. 478, *supra*.

[2] Goodwin *v.* Robarts, 1 App. Cas. 476; *S. C.* L. R. 10 Ex. 337; Rumball v. Metropolitan Bank, L. R. 2 Q. B. D. 194.

[3] White *v.* Vermont & Mass. R. R Co. 21 How. 575; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Clark *v.* Iowa City, 20 Wall. 583; Haven *v.* Grand Junction R. R. & Depot Co. 109 Mass. 88; Aurora City *v.* West, 7 Wall. 82; Connecticut Mutual Life Ins. Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co. 41 Barb. (N. Y.) 9; Morris Canal & Banking Co. *v.* Fisher, 9 N. J. Ch. (1 Stockt.) 667, 699; Carr *v.* Le Fevre, 27 Pa. St. 413, 418; Chapin *v.* Vt. & Mass. R. R. Co. 8 Gray (Mass.), 575; Langston *v.* S. Carolina R. R. Co. 2 S. C. 248; Mercer County *v.* Hacket, 1 Wall. 83, 95; Knox County *v.* Aspinwall, 21 How. 589; Zabriskie *v.* Cleveland, Columbus & Cincinnati R. R. Co. 23 How. 381, 400; Hubbard *v.* N. Y. & Harlem R. R. Co. 36 Barb. (N. Y.) 286; Craig *v.* City of Vicksburg, 31 Miss. 216; County of Beaver *v.* Armstrong, 44 Pa. St. 63, 68; Blake *v.* Livingston County, 61 Barb. (N. Y.) 149; Brainerd *v.* N. Y. & Harlem R. R. Co. 25 N. Y. 496; Dinsmore *v.* Duncan, 57 N. Y. 573; Welch *v.* Sage, 49 N. Y. 143; Hodges *v.* Shuler, 22 N. Y. 114;

Nelson, of the Supreme Court of the United States, pronouncing the decision of that court to this effect,[1] said: "We think the usage and practice of the companies themselves, and of the capitalists and business men of the country dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question. Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years, large masses of them have gone into general circulation, and in which capitalists have invested their money; and it is not too much to say, that a great share of the confidence they have acquired, as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand, as the protection afforded to the *bonâ fide* holder." Such bonds are not, like promissory notes and bills of exchange, negotiable under the law merchant; but being designed to be passed from hand to hand by delivery, they have by common usage become assignable by delivery, so as to enable the holder to maintain an action on them in his own name.[2] Though not exactly governed by the law merchant, they are entitled to the privileges of commercial paper.[3] "Usages of trade and commerce are acknowledged by the courts as part of the common law, although they have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer, and gives a bond negotiable, with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment

Virginia *v.* Chesapeake & Ohio Canal Co. 32 Md. 501; Wickes *v.* Adirondack Co. 2 Hun (N. Y.), 112; City of Elizabeth *v.* Force, 29 N. J. Eq. 587. *Contra*, but not to be regarded as authorities on this point, Diamond *v.* Lawrence County, 37 Pa. St. 353; Clarke *v.* City of Janesville, 1 Biss. 98; Jackson *v.* York & Cumberland R. R. Co. 48 Me. 147; Myers *v.* York & Cumberland R. R. Co. 43 Me. 232.

[1] White *v.* Vt. & Mass. R. R. Co. 21 How. 575.

[2] Bunting *v.* Camden & Atlantic R. R. Co. 81 Pa. St. 254; 15 Am. Ry. R. 570; Carr *v.* Le Fevre, 27 Pa. St. 413.

[3] Junction R. R. Co. *v.* Cleneay, 13 Ind. 161.

by parading some obsolete judicial decision, that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court, but of nearly every state in the Union, is well known and admitted." [1]

199. **The fact that an unpaid coupon is attached to a bond not yet due** is not alone sufficient to affect the position of a purchaser of the bond and the subsequently maturing coupons, as a *bonâ fide* purchaser. This alone does not subject the bond to defences which may be good against the original holder. "To hold otherwise," said Field, J., speaking for the Supreme Court of the United States,[2] "would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every instalment of interest on them as it matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons, dishonored paper, subject to all defences good against the original holders, would greatly impair the currency and credit of such securities, and correspondingly diminish their value."

But it has been held that the fact that coupons overdue and unpaid for several years were attached to the bond at the time of purchase was a circumstance of suspicion sufficient to put a purchaser on guard.[3] The reasoning of the court in this case would equally make a bond with a single coupon overdue and unpaid dishonored paper; for they say the interest, equally with the principal, is a part of the debt secured, and it is immaterial whether the whole or only a part of the debt is overdue. When

[1] Per Grier, J., in Mercer County *v.* Hacket, 1 Wall. 83, 95.

[2] Cromwell *v.* County of Sac, 96 U. S. 51, 58; National Bank of N. A. *v.* Kirby, 108 Mass. 497.

[3] First Nat. Bank of St. Paul *v.* County Commissioners of Scott County, 14 Minn. 77.

due the plaintiff has a right of action for the recovery of the interest, in the same way that he would have for the recovery of any other instalment on the bond. In view of the authority and reasoning of the Supreme Court of the United States, and of the Supreme Court of Massachusetts on this subject, the above case cannot be regarded as law. A purchaser in good faith of ordinary coupon bonds is unaffected by want of title in the vendor. The possession of such bonds carries the title with it to the holder. Even suspicion on the purchaser's part of defect of title in the seller, or knowledge on the purchaser's part of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the purchaser in purchasing the bonds, does not defeat his title. That is affected only by bad faith on his part. On a question of such faith, the burden of proof lies on the party who assails the possession.[1] But where the defendant has shown strong circumstances of fraud in the origin of the instrument, such evidence casts upon the holder of it the necessity of showing that he gave value for it before maturity.[2]

200. **Although they contain an agreement for their conversion into stock**, the coupon bonds of a railroad company, payable to a person named or bearer, are negotiable instruments, with the privileges of such paper; and so although the bonds contain an agreement on the part of the company to make what is termed "scrip preferred stock" in exchange therefor at any time within ten days after any dividend should become payable on such stock.[3] Such an agreement is independent of the pecuniary obligation contained in the instrument, and does not change the duty of the company with respect either to the principal or interest stipulated. Whether the agreement to convert into preferred stock is of any value or not, it can in no way affect the negotiable character of the instrument; and therefore the title of a *bonâ fide* holder is good, although the bonds may have been stolen from the former owner.

Where it further appeared that to such bonds there was attached

[1] Murray *v.* Lardner, 2 Wall. 110; approving Goodman *v.* Harvey, 4 Ad. & El. 870, and affirming Goodman *v.* Simonds, 20 How. 343. See, also, Cromwell *v.* County of Sac, 96 U. S. 51.

[2] Smith *v.* Sac County, 11 Wall. 139.

[3] Hotchkiss *v.* National Banks, 21 Wall. 354.

by a pin the certificate of such preferred stock, which stated that the bondholder was entitled to a certain number of shares of such stock, and that upon the surrender of the bonds he should be entitled to receive the stock, the bonds having been stolen and negotiated to one who took them without actual notice of any defect in the title to them, the fact that the certificate originally attached to the bonds had previously been detached was held not to be a circumstance sufficient to put the person who took the bonds upon inquiry as to the title of the previous holder.[1] The title of a person who takes negotiable paper before due for a valuable consideration can only be defeated by bad faith on his part, which implies guilty knowledge or wilful ignorance of facts impairing his title; and the burden of proof lies on the assailant of the title.

201. **Bonds and debentures which are not negotiable instruments are merely choses in action,** not assignable at law, and purchasers, though buying them in good faith, for value, without notice, take them subject to the equities attached. Therefore, if such debentures are issued by the chairman of the directors, in fraud of the company, the company may, upon the discovery of the fraud, disclaim its liability. Although the transfer be recorded upon the books of the company, and interest upon the debenture be paid for a year or more, until an investigation of the company's affairs by the stockholders revealed the fraud, these acts will not have the effect of a confirmation of the title of one who has purchased the debentures in the market in the ordinary course of business. The stockholders not being bound by the loan originally, are not bound by payments of interest or other acts without their knowledge.[2]

Of course, a purchaser of overdue bonds takes them subject to the rights of antecedent holders to the same extent as other paper bought after its maturity.[3]

202. **Written contracts are not necessarily negotiable because by their terms they enure to the benefit of the bearer.**

[1] Hotchkiss *v.* National Banks, 21 Wall. 354; Murray *v.* Lardner, 2 Wall. 110; Welch *v.* Sage, 47 N. Y. 143.

[2] Athenæum Life Assurance Soc. *v.* Pooley, 3 De G. & J. 294.

[3] Vermilye *v.* Adams Express Co. 21 Wall. 138.

Whether they are negotiable in the sense that innocent holders of them are protected in their title to them depends in part upon the subject matter of the contract. Hence, a certificate by which a person acknowledges that he has received a certain number of shares of stock in a corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free, in the hands of the transferee, from the equities which would have affected it in the hands of the original holder.[1] Certificates of stock, though they pass from hand to hand by delivery, do not partake of the character of negotiable paper, and therefore the assignee has no better title than the assignor.[2]

A bond is rendered non-negotiable by inserting in it a provision to do something else than pay money, as for instance to feed and clothe a slave.[3]

203. **A purchaser of bonds which refer to the mortgage securing them is bound by any statements contained in the mortgage** affecting the security. The mortgage referred to necessarily becomes a part of the bonds in determining exactly what they are represented to be. Thus the New York, Kingston, and Syracuse Railroad Company, having a mortgage of $2,000,000 upon its road, executed another mortgage of the same and some additional property to secure bonds to the amount of $4,000,000, which were described on their face as first mortgage consolidated bonds, and indorsed "consolidated first mortgage bonds." These bonds referred to a mortgage from which it appeared that it was intended to substitute a portion of the bonds for the first mortgage bonds already issued, and to devote the remainder to the extension and completion of the road. In an action against the company and its president and directors, grounded on fraud in issuing the bonds, the plaintiffs alleged that they furnished certain materials to the contractor engaged in building the extension of the road, under an agreement with him to receive in payment notes secured by first mortgage bonds of the defendant corporation; and that they took the consolidated first mortgage bonds in

[1] Railroad Co. *v.* Howard, 7 Wall. 392.

[2] Weaver *v.* Barden, 49 N. Y. 286; 3 Lans. 338; Dunn *v.* Commercial Bank of Buffalo, 11 Barb. (N. Y.) 580; Leitch *v.* Wells, 48 N. Y. 585; Salisbury Mills *v.* Townsend, 109 Mass. 115; Shaw *v.* Spencer, 100 Mass. 382; 1 Am. R. 115.

[3] Knight *v.* Wilmington & Manchester R. R. Co. 1 Jones L. (N. C.) 357.

the belief that they were the first mortgage bonds of the company, when in fact they were not. The Supreme Court of New York, however, regarded the use of the word "consolidated" as sufficient to put a purchaser upon his inquiry, even if it did not in itself control and qualify the statement that the bonds were first mortgage bonds.[1] Moreover, the bonds referring to the mortgage, the purchaser is affected with its contents; and that, on inspection, would have disclosed the fact that the design was to substitute these bonds for bonds previously issued and secured by mortgage, and would have dictated the propriety, as a matter of security, of ascertaining whether the holders of the old bonds were willing to make the exchange or accept the new bonds. These bonds would not all become first mortgage bonds without such change; but there is no allegation or proof that the directors of the corporation knew that the substitution would not be accomplished, or that they increased the issue of bonds unlawfully, or for a fraudulent purpose; on the contrary, it must be inferred that the directors believed in the success of the scheme, and that the contractor, knowing the precise character of the bonds, must have had faith in their ultimate value. "The case presented seems, therefore, to be bald in several respects, namely: the absence of fraudulent design or purpose in issuing the bonds; the absence of any charge connecting the defendants, the directors, with the delivery of them to the plaintiffs; the absence of allegation or charge showing the plaintiffs to be *bonâ fide* holders for value, and the absence of any representation by the defendants, the directors, aside from the bonds themselves, which explained their design and purpose sufficiently to notify the purchaser or person taking them of their character, or that he should examine." In conclusion, the court remark that it is not intended by the result to justify the proceeding complained of; that first mortgage bonds ought to mean first mortgage bonds, and should not be issued until all the preliminaries to make them such have been observed and performed.

204. A bond of a corporation for the payment of money, negotiable in form but delivered with the name of the payee in blank, may be filled in with the name of the holder and sued in his name.[2] In England the law has been settled otherwise, upon

[1] Caylus *v.* N. Y., Kingston & Syracuse R. R. Co. 10 Hun (N. Y.), 295.

[2] White *v.* Vt. & Mass. R. R. Co. 21 How. 575; Chapin *v.* Vt. & Mass. R. R.

the principle that the authority of an agent to make a deed for another must be by deed, and that he cannot fill the blank, either under an implied or express parol authority from the maker. Baron Parke, in a case where a certificate of stock was issued and filled up in this way, said:[1] "This is an attempt to make a deed transferable and negotiable like a bill of exchange, or exchequer bill, which the law does not permit." But in this country, so far as corporate bonds for the payment of money are concerned, this objection has no weight. On the contrary, the negotiable quality of such instruments is regarded as one of their chief advantages, and this quality has been established by long usage. When, therefore, a corporation issues bonds in blank, it is plainly its intention to become bound to every person by whom any of the bonds may be holden; and the implication is unavoidable that the corporation consents that any *bonâ fide* holder for value may perfect the contract by inserting at his own pleasure his name as obligee of the bond in the blank space which has been left for that purpose. "In other words," says Mr. Justice Nelson,[2] "the company intended, by the blank, to leave the holder his option as to the form or character of negotiability, without restriction. If the utmost latitude, in this respect, was not intended, why leave the payee in blank when issuing the bonds, or why not fix the limit of negotiability, or negative it altogether? To adopt any other conclusion would seem to us to be unjust to the company, for then the blank would be wholly unmeaning; or, if any, a meaning calculated, if not intended, to embarrass the title of the holder."

205. A condition indorsed upon debenture bonds that at stated times a portion of the bonds should be drawn and paid off was held to prevent their being negotiable at law, although in terms made payable to bearer; and moreover it was held that it was not competent for corporations to attach the incident of negotiability to such instruments contrary to the general law; and that the custom to treat them as negotiable, being of recent origin,

Co. 8 Gray (Mass.), 575; Dutchess Co. Ins. Co. *v.* Hachfield, 1 Hun (N. Y.), 675; *S. C.* 47 How. Pr. (N. Y.) 330; and see Michigan Bank *v.* Eldred, 9 Wall. 544.

[1] Hibblewhite *v.* M'Morine, 6 Mees. & W. 200; and see Enthoven *v.* Hoyle, 13 C. B. 373.

[2] In White *v.* Vt. & Mass. R. R. Co. *supra*.

and not the law merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law.[1] This decision was, however, questioned by the Court of the Exchequer Chamber,[2] which, after observing that no evidence was offered at the trial in that case as to whether these or similar documents were in practice treated as negotiable, and that no express admission was made as to the point, said: "While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shown to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to *Gorgier* v. *Mieville*,[3] are to be treated as negotiable. We think the judgment in *Crouch* v. *The Credit Foncier* may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called 'the ancient law merchant.'"

The case in the Exchequer Chamber arose with reference to scrip issued in England by the agent of a foreign government upon the payment of the first instalment of a subscription to bonds afterwards to be issued. The scrip was in terms payable to bearer, and by the usage of bankers and dealers in public securities was transferable by mere delivery; and the court decided that it passed by such delivery to a *bonâ fide* holder for value.[4]

This case must be regarded as deciding, after considerable conflict of authority, that instruments payable to "bearer," or "holder," or "transferee," or "order," and the like, which by usage are transferable by delivery, are in law fully negotiable.

[1] Crouch *v.* Credit Foncier of England, L. R. 8 Q. B. 374.

[2] Goodwin *v.* Robarts, L. R. 10 Ex. 337.

[3] 3 B. & C. 45.

[4] The scrip was in the following terms: "Scrip for one hundred pounds stock, No. ——. Received the sum of twenty pounds, being the first instalment of twenty per cent. upon one hundred pounds stock; and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds, after receipt thereof from the imperial government."

206. Bonds of a corporation payable to a person named "or assigns" are assignable at law, so as to enable the holder to maintain an action in his own name only by an indorsement in writing by the obligee.[1] In equity they may be assigned by delivery merely; but then an action upon them must be brought in the name of the obligee.

Although the instrument be not strictly negotiable at law, yet if it contains anything to show that the parties intended to renounce the ordinary rule that the assignee of a chose in action takes it subject to the equities between the original parties, or if the company making it has held it out to the world as free from such equities, the company is barred from subsequently setting up such equities. Thus, where debentures payable to a person, "his executors, administrators, and assigns," were issued to a shareholder in the company who assigned them, it was held in a suit against the company by the assignee that the company could not set up in defence the claim that the original holder was indebted for unpaid calls upon his shares, and that by the articles of association the company had a primary lien on the debentures of any member who might be indebted to it. It was contemplated that the original holder should assign the debentures if he saw fit, and that he could not practically do if they were subject to the equity claimed.[2]

207. A purchaser of negotiable bonds before due, for a valuable consideration, in good faith and without actual knowledge or notice of any defect of title, holds them by a title valid as against every other person.[3] Even gross negligence at the time of purchase does not alone defeat the purchaser's title. A purchaser may have had suspicion of a defect of title, or knowledge of circumstances which would excite such suspicion in the mind

[1] Bunting *v.* Camden & Atlantic R. R. Co. 81 Pa. St. 254; 15 Am. Railw. R. 570; Hubbard *v.* N. Y. & Harlem R. R. Co. 36 Barb. (N. Y.) 286.

[2] Higgs *v.* Northern Assam Tea Co. L. R. 4 Ex. 387, 396. See, also, Crouch *v.* Credit Foncier of Eng. L. R. 8 Q. B. 385; Goodwin *v.* Robarts, L. R. 10 Ex. 337.

[3] Imperial Land Co. of Marseilles *in re*, 11 Eq. 478, where the English cases are fully examined; Scybel *v.* National Currency Bank, 54 N. Y. 288; Dutchess Co. Ins. Co. *v.* Hachfield, 1 Hun (N. Y.), 675; 47 How. Pr. (N. Y.) 330; Madison & Indianapolis R. R. Co. *v.* Norwich Saving Soc. 24 Ind. 457; New Orleans, Jackson & Great Northern R. R. Co. *v.* Mississippi College, 47 Miss. 560; Belo *v.* Com'rs of Forsythe Co. 76 N. C. 489.

of a prudent man; or he may have disregarded notices of stolen bonds; and yet if he has purchased for value in good faith, his title cannot be impeached. Such suspicion, or ground of suspicion, or of knowledge on his part, may be evidence of bad faith; but before his title can be impeached his bad faith must be established. It must be shown that he did not purchase honestly.[1]

It is a presumption of law that the person presenting a negotiable bond is a *bonâ fide* holder, and until evidence is introduced tending to negative that presumption, he is under no obligation of proving himself a *bonâ fide* holder.[2] If his good faith is denied by the answer, he is entitled to show by affirmative evidence that he is a *bonâ fide* holder.[3]

A *bonâ fide* purchaser of stolen bonds who pays full value for them in the regular course of business, before their maturity, acquires good title to them, and to such of the coupons as were not overdue at the date of his purchase. In a suit by the purchaser upon such bonds, the burden of proof that he did not acquire them in good faith is upon the defendant.[4] The fact that the real owner gave immediate notice by publication of the fact that the bonds had been stolen does not affect the title of a subsequent purchaser for value.[5] It is usual for bankers and brokers upon receiving notice of such thefts to retain the memorandum for the purpose of identification of the bonds, should they be presented; but there is no legal obligation upon them to do so; and if they keep such notices, the mere omission to look for them twelve months after publication is no proof of bad faith.[6]

208. A purchaser of negotiable securities before maturity can recover against the maker the full amount of them, although he may have paid less than their par value for them. Whatever may have been their original infirmity, he is not lim-

[1] Murray *v.* Lardner, 2 Wall. 110; Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459, 478.

[2] Kennicott *v.* Supervisors of Wayne County, 6 Biss. 138; Wickes *v.* Adirondack Co. 2 Hun (N. Y.), 112.

[3] County of Macon *v.* Shores, U. S. Supreme Ct. 17 Albany Law J. 35.

[4] Gilbough *v.* Norfolk & Petersburg R. R. Co. 1 Hughes, 110; Spooner *v.* Holmes, 102 Mass. 503; Evertson *v.* Nat. Bank of Newport, 66 N. Y. 14; Seybel *v.* Nat. Currency Bank, 2 Daly (N. Y.), 383; *S. C.* 54 N. Y. 288; Carpenter *v.* Rommel, 5 Phila. (Pa.) 34; Consolidated Ass'n *v.* Numa Avegno, 28 La. Ann. 552; California *v.* Wells, 15 Cal. 336.

[5] Seybel *v.* Nat. Currency Bank, *supra*; Murray *v.* Lardner, 2 Wall. 110.

[6] Raphael *v.* Bank of England, 17 C. B. 161; Vermilye *v.* Adams Express Co. 21 Wall. 138.

ited in his recovery upon them to the amount he paid his vendor, unless he is personally chargeable with fraud in procuring them. "We are aware," said Mr. Justice Field, speaking for the Supreme Court of the United States,[1] "of numerous instances in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is, that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bonâ fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes only a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured."

Bonâ fide holders of negotiable bonds are presumed to hold them for their full value, and their title can be impaired only by specific allegations distinctly proved.[2]

The fact that a merchant has taken bonds from a railroad company in payment for goods does not of itself prevent him from being a *bonâ fide* holder. The goods may be as valuable to the company as money.[3] To affect the good faith of the transaction, there must be circumstances showing that the purchaser knew there was a corrupt or fraudulent motive on the part of the officer of the company in transferring the bonds. The purchaser of negotiable bonds has nothing to do with the application of the proceeds of the purchase, if he has no knowledge of any intended misapplication of them.[4]

After bonds have passed from the hands of the person to whom

[1] Cromwell *v.* County of Sac, 96 U. S. 51, 60; and see Chicopee Bank *v.* Chapin, 8 Met. (Mass.) 40; Stoddard *v.* Kimball, 6 Cush. Mass.) 469; Williams *v.* Smith, 2 Hill (N. Y.), 301; Lay *v.* Wissman, 36 Iowa, 305. *Contra*, Diamond *v.* Lawrence County, 37 Pa. St. 353.

[2] Bronson *v.* La Crosse & Milwaukee R. R. Co. 2 Wall. 283; Wickes *v.* Adirondack Co. 2 Hun (N. Y.), 112.

[3] Kennicott *v.* Supervisors of Wayne County, 6 Biss. 138.

[4] Philadelphia & Sunbury R. R. Co. *v.* Lewis, 33 Pa. St. 33.

they were issued into the hands of *bonâ fide* holders, the corporation which issued them cannot set off against the bonds a claim for damages against the original holder; as for instance where the bonds were issued to a contractor, damages for not finishing the road in the time specified by contract cannot be set up as against *bonâ fide* purchasers of the bonds.[1]

209. A bona fide purchaser of bonds which a company has pledged for a loan can hold them against the company for at least the amount he has paid for them. Thus, the Grand Rapids and Indiana Railroad Company, through its president, borrowed money of its New York agents, and pledged with them the bonds of the company to a large amount as security for the loan of an inconsiderable amount. The agents, without authority, sold the bonds or exchanged them for real estate, and the first purchasers resold them. In an action by the company to recover the bonds, it was held that the amount actually paid them by the purchaser might be taken into consideration in determining his good faith.[2] At the time of the second sale there were overdue coupons upon the bonds, which provided that after six months' default the whole principal sum should immediately thereafter become due and payable. Whether this condition had the effect to make the bonds overdue it was unnecessary to decide, because the first purchaser, having bought them in good faith before maturity, he could give a good title to one purchasing from him in good faith after maturity. The unpaid coupons did not necessarily affect the purchaser with notice or knowledge of any facts by which the validity of the bonds was made questionable. The interest might well remain unpaid, not from any infirmity in the bonds themselves, but through want of means in the company to pay them. Under the circumstances of the case, it was determined that the last purchaser was entitled to hold the bonds for the amount he paid for them, although this amount was in excess of the sum originally borrowed by the company upon them; but that the company might recover them upon the payment of this amount.

210. Purchasers of bonds are not put to their inquiry

[1] McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.

[2] Grand Rapids & Indiana R. R. Co. *v.* Sanders, 54 How. (N. Y.) Pr. 214.

whether the bonds were issued simultaneously with the mortgage by which they are secured. The mortgage, when recorded, is notice to all who may acquire liens upon it afterwards of the debt secured. "The bonds are payable to bearer, and are intended to be negotiated for the purpose of raising money to construct the road. If the purchaser of a bond in New York, in Amsterdam, or London, is bound to inquire whether the bond in fact was executed by the company contemporaneously with the execution of the mortgage, or whether before the signing or the negotiating of the bonds liens of laborers or material-men may not have attached to the road, it is apparent that the value of these securities would be much depreciated, and all industries which depend upon the raising of means through negotiation would be paralyzed." [1]

III. *Incomplete and altered Bonds.*

211. Bonds incomplete when put in circulation are not entitled to the privileges of negotiable paper. While, as a general rule, bonds issued by a corporation, and payable to bearer, have the qualities of negotiable instruments, and are good in the hands of *bonâ fide* holders for value, the rule is predicated of bonds that are duly executed, and are free from any defect by reason of any uncertainty in any essential requisite of a negotiable instrument. An uncertainty in the amount of the principal or interest of a bond deprives it of the quality of a negotiable instrument. This point is illustrated by the case of certain bonds of the Vicksburg, Shreveport, and Texas Railroad Company, which were taken from the office of the company at Monroe, in the State of Louisiana, in April, 1864, at the time of a raid of the naval forces of the United States upon that town, during the war against the seceding states, and carried off by persons connected with the expedition, without the consent of the officers of the company, and afterwards put in circulation. The face of the bonds certified that the company "is indebted to John Ray, or bearer, for value received, in the sum of either two hundred and twenty-five pounds sterling, or one thousand dollars lawful money of the United States of America; namely, two hundred and twenty-five pounds sterling, if the principal and interest are payable in London, and one thousand dollars lawful money of the United States of Amer-

[1] Nelson *v.* Iowa Eastern R R Co. 8 Am. Railway Rep. 82, 88, per Day, J.

ica, if the principal and interest are payable in New York or New Orleans." They further declared that the president of the company is authorized to fix by his indorsement the place of payment of principal and interest of the bonds. On the back of each of the bonds was an indorsement as follows: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——," signed by the president. The coupons declared that the company would pay nine pounds sterling, if payable in London, or forty dollars, if payable in New York or New Orleans.

Upon a bill in equity to sell the road under a mortgage securing the bonds, it was claimed that the uncertainty in the amount of the bonds was cured by the signature of the president of the road to the indorsement upon the bonds, although that left the place of payment blank; and that the indorsement in this form authorized the holder to fill the blank, and thus render the amount of the bond definite and certain. But the court held that whatever might have the effect of a delivery of the bonds in this form by the company, the bonds having been stolen, they carried no implied authority to a subsequent *bonâ fide* holder for value to fill the blank, and thus perfect the bonds; and consequently the bonds were subject to all the infirmities which attached to the title to them.[1]

212. Ledwick *v.* McKim.[2] — In an action to recover the purchase money of some of the same bonds, the Court of Appeals of New York also held that they were incomplete instruments, and therefore not within the rules which protect *bonâ fide* holders for value of negotiable commercial paper. A negotiable instrument must be complete and perfect when it is issued, or there must be authority reposed in some one afterward to supply what is needed to make it perfect. It was evident upon the face of these bonds that they were meant to have a specific place of payment, and that the kind of national money in which they were to be paid, and the amount thereof, were also to be specific, and that all of this was yet to be specified when they came into and passed out of the hands of the defendants. An exact place of payment, when a place of payment is meant to be fixed, and an exact amount

[1] Jackson *v.* Vicksburg, Shreveport & Texas R. R. Co. 2 Woods, 141.

[2] 53 N. Y. 307.

to be paid, are essential parts of a negotiable instrument. These bonds were not perfect when they passed from the possession of the defendants to the plaintiff; for it was not then determined where they were to be paid, nor in what national money they were to be paid. The corporation had given power to their president to fill this blank, which power he had not exercised. The defendants contended that they, or any holder of the bonds, were authorized to fill the blank. Such authority must be either express or implied from an actual delivery for future use of the instrument, though still in its imperfect condition. "As to an express authority," said Judge Folger, "there can be no question or doubt. The implied authority is found in the fact of delivery for use. For as it is not to be presumed that the delivery for use was meant to be a nugatory and unavailing act, and as it is apparent that it would be if the instrument may not be perfected before put to use, the law implies an intention, and hence an authority, that he to whom it is thus delivered may supply all needs for making it a perfect and binding negotiable instrument. But this authority is implied from the fact alone that the paper is in hands other than those of him who is to be bound; but from that fact, joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation. And an express authority, though it be limited, if it be exceeded by the one in whom confidence has been reposed, renders the party to the instrument liable to a *bonâ fide* holder for value, on the principle that of two, one of whom must suffer by the wrongful act of a third, it should be he who has enabled the wrongful act to be done. But there cannot be an enabling of the wrongful act unless there be assisting action of the party to the instrument who is sought to be bound, and there must be that in his conduct, in relation to the paper, which shows a parting with the possession of it for use, or with a confidence in him to whom it is delivered." But in this case, the bonds having been stolen while still in the possession of the corporation, no implication of authority to fill the blank could arise.

Thus, also, where bonds were stolen which were at the time incomplete, being without the seal of the company, and the certificate of the Union Trust Company, which the mortgage made requisite to their validity, and subsequently the seal and the certificate, were forged and affixed to the bonds, it was held that a

purchaser for value and in good faith could not recover from the company thereon, or compel the issue of other bonds in their place.[1]

213. The effect of an over-issue of bonds under a mortgage depends largely upon the condition of the equity of redemption. If that has been incumbered by subsequent mortgages or liens, which are entered of record, the prior mortgage is good against them for only the amount that appears of record to be a lien. The company itself may be estopped to claim that the bonds issued in excess of the amount of the mortgage as recorded are not in fact secured by it; and others in privity with the company, and not having any recorded lien, may be bound by the same estoppel. The Covington and Lexington Railroad Company executed a mortgage to secure four hundred of its bonds for $1,000 each. By mistake, the company issued and sold four hundred and twenty bonds, of which one hundred and sixty were six per cent. bonds, and two hundred and sixty were seven per cent. bonds. Instead of numbering them from 1 to 420, which would have made the mistake manifest, the company numbered each class separately from 1 to 160 and from 1 to 260. To each bond was attached a certificate showing that it was secured by mortgage, and that the amount of the bonds issued and to be issued was not to exceed $400,000. The holders of the twenty extra bonds bought them in ignorance of the over-issue. The company afterwards executed other mortgages which were recorded, and also income bonds which were not secured by any recorded instrument. The property of the company having afterwards been sold, and the proceeds being insufficient to pay all these debts, the question arose as to the rights of the holders of these twenty bonds over-issued. It was held that the company was estopped from denying that these bonds were secured by the mortgage; and that this mortgage by estoppel gave to the holders of these bonds an equitable lien, which, though unrecorded, was superior to the lien of the unrecorded income bonds subsequently issued. In a contest between equities, seniority prevails; and it is immaterial that the holders of the income bonds had no notice of the over-issue and of the estoppel of the company.[2]

[1] Mass v. Mo., Kansas & Texas Ry. Co. 11 Hun (N. Y.), 8.

[2] Stephens v. Benton, 1 Duv. (Ky.) 112.

214. The numbering of bonds does not ordinarily give the holders of the lower numbers any preference over the holders of the higher, when there has been an over-issue of bonds beyond the amount provided for by the mortgage. All *bonâ fide* holders for value stand upon the same footing. The Alabama and Chattanooga Railroad Company, a corporation of the State of Alabama, was chartered to construct a road from Chattanooga, in the State of Tennessee, across the States of Georgia and Alabama to Meridian, in the State of Mississippi. An act of the legislature of Alabama [1] required the governor of the state, whenever any railroad company of the state should have finished, equipped, and completed twenty continuous miles of railroad, to indorse on the part of the state the first mortgage bonds of the railroad company to the amount of sixteen thousand dollars per mile, for the portion thus finished and completed, and to indorse the same bonds at the rate of sixteen thousand dollars per mile for each section of five miles subsequently completed and equipped. The act also applied to railroads constructed beyond the limits of the State of Alabama by any railroad company organized under the laws of the state. The act further provided that the bonds should not be indorsed by the governor until the president and chief engineer of such company, upon oath, showed that the conditions of the act had been complied with in all respects. Soon after the passing of this act the above named company conveyed to trustees, to secure its first mortgage bonds, its entire road, together with all its other property, equipments, and franchises. The mortgage recited that the bonds to be secured were to be issued at the rate of sixteen thousand dollars per mile of its road. Bonds of $1,000 each, to the number of 5,220, purporting to be secured by this mortgage, and all bearing the same date, were issued. Each bond recited on its face that it was one of a series of numbered bonds issued in accordance with the above mentioned statute, and secured by an indorsement of the State of Alabama, and by a first lien upon the entire road and property of the railroad company. Each bond also bore the indorsement of the Governor of Alabama, with the recital that the company had complied with the conditions prescribed by law upon the performance of which the governor was required to make such indorsement. Upon each bond was also indorsed a certificate signed by the trustees named in

[1] Approved Sept. 22, 1868; Rev. Code of Ala. 1867, §§ 1417, 1422.

the mortgage, that the bond was one of the series of first mortgage bonds described in and secured by the mortgage deed. Upon a subsequent default the mortgage was foreclosed, and at the sale the property was bid in by the trustees for the benefit of the bondholders.

It appeared by evidence in the case, not disputed, that the length of the road from Chattanooga to Meridian was only two hundred and ninety-five miles. At the rate of sixteen thousand dollars per mile, the mortgage authorized the issue of 4,720 bonds of $1,000 each, and the governor was authorized to indorse only that number, — but in fact did indorse the whole number issued, being five hundred more than was authorized. The holders of the bonds bearing numbers higher than 4,720 applied to the court for leave to file their bonds and become sharers in the title to the property bought by the trustees. Their petition was resisted by the holders of bonds bearing lower numbers, upon two grounds: first, because the petitioners holding the high numbered bonds were put on notice of the fact that their bonds were not secured by the mortgage; and, second, because by the very terms of the mortgage these bonds were not secured by it.

To the first position the court replied:[1] "The power of the railroad company to issue bonds was unlimited. It could issue as many as it chose. The bonds are therefore binding upon the railroad company. Were the holders of the bonds put upon sufficient notice of the facts that bonds held by them were not secured by the mortgage? The holders of the bonds were bound to take notice of what was contained in or indorsed upon their bonds; they were bound to take notice of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage. . . . . It would seem that the very bonds and mortgage which put the purchasers upon inquiry lulled and satisfied inquiry. They had the right to presume that the governor had not violated his duty; that, before he indorsed the bonds, he had on file the oath of the president and chief engineer of the railroad company that a sufficient number of miles of railroad had been completed to authorize the indorsement. Besides this, they had the statement of the president and treasurer of the railroad company on the face of the bond, and of the trustees for

[1] Stanton *v.* Alabama & Chattanooga R. R. Co. 2 Woods, 523, 528, per Woods, Circuit Judge.

all the bondholders upon the back of the bond, that the bonds were secured by the mortgage. . . . .

"But suppose the purchaser of bonds had ascertained the length of the road for himself by actual measurement, how would that help him to know whether his bonds were outside or inside the terms of the mortgage? The bonds all bear the same date, and fall due on the same day. Bond number one has, therefore, no advantage over any other bond, and no presumptions are to be indulged in its favor. There is no presumption of law that it was issued first or sold first. On the contrary, the presumption is that all were sold at the same time. Practically, we know that where a large number of bonds are put upon the market, the high-numbered bonds are just as likely to be sold first as the low-numbered bonds. So that if the purchaser should, before purchasing, ascertain for himself the precise length of the road, he would have no means of ascertaining whether his bonds were over-issue bonds or not. The holders of the five hundred bonds highest in number would have precisely the same ground to say that the first five hundred are over-issues, as the holders of the first five hundred have to say this of the last five hundred. I conclude, therefore, that while it is true that the mortgage limits the number of bonds to be secured thereby, and the holder of bonds might be required to take notice of that limitation, there was nothing to put him upon notice that the limit thus fixed had been exceeded; on the contrary, that all the presumptions and all the evidence was that it had not; nor, if he had ascertained that the limit had been exceeded, was he bound to conclude from the fact that his bonds bore the high numbers, that they were the over-issue bonds rather than others."

215. All the bonds secured are presumed to have been issued at the same time. — To the claim made in the case last considered,[1] that the mortgage was executed to secure sixteen bonds of $1,000 each to the mile, and no more, that no larger number of bonds could be secured by it than its terms authorized, and that when the company had issued bonds to this extent it had no power to issue a greater number to be secured by that mortgage, substantially the same reply is made: there is no way of ascertaining which are the bonds over-issued and not secured. The law pre-

[1] Stanton *v.* Alabama & Chattanooga R. R. Co. *supra.*

sumes they were all issued at the same time, and the purchaser has the right to act on that presumption. The numbering is merely a matter of convenience in their registration and identification. "The case is this," says the Circuit Judge, Mr. Woods. "A mortgage is made to trustees to secure a given number of bonds, and, as a matter of security to the bondholders, the trustees are required to place their certificate upon the bond to the effect that it is described in and secured by the mortgage. The common trustees of all the bondholders are unfaithful and certify to a larger number of bonds than were intended to be secured by the mortgage. The result is, that all must suffer from the unfaithfulness of the trustees. But no part of the bondholders can say that the loss shall fall exclusively on others. It is a case for the application of the rule that equality is equity. A second mortgage bondholder would have the right to insist that the first mortgage should only secure bonds to the extent of $16,000 per mile. But no first mortgage bondholder has the right to say that he shall be paid in full to the exclusion of others whose bonds purport to be secured by the same mortgage, and whose equities are equal to his." Even if there were a second mortgage upon the property, in case the foreclosure sale did not produce a sum more than sufficient to pay the amount actually secured by the mortgage, no second mortgage bondholder is injured by allowing the over-issue to share in the proceeds, and no first mortgage bondholder can exclude any other from sharing in the proceeds. In case the proceeds of the foreclosure sale had exceeded the amount secured by the mortgage, and there were no subsequent incumbrance, all the bonds, being valid debts of the company, would be paid in full, or *pro rata* so far as the proceeds would go; but if there were a second mortgage, the amount for which the first mortgage was a security by its terms would be distributed *pro rata* among all the bondholders.

216. The alteration of the number of a negotiable bond not required by law to be numbered, inasmuch as it does not change the tenor of the bond, is immaterial; and although made with fraudulent intent, does not avoid it against a holder who takes it afterwards in good faith, for value, without notice of the alteration, or reason to suspect it.[1] Marks of such alteration, when

[1] Commonwealth *v.* Emigrant Industrial Savings Bank, 98 Mass. 12; Birdsall *v.*

slight only, will not discredit the bond in the market, or deprive the holder of the protection of a *bonâ fide* holder.[1] A purchaser of such bonds in open market is not bound to make a close and critical examination of it to escape the imputation of bad faith in the purchase. Even his knowledge of suspicious circumstances is immaterial, unless amounting to proof of want of good faith.[2] "The number of the bond," say the New Jersey Court of Errors and Appeals, "is put upon it as a mark denoting, for the convenience and protection of the maker, that it is one of a series; but such mark does not enter into or in anywise affect the agreement embodied in it; the purchaser has nothing to do with it and need give it no heed. To lay down the broad doctrine that an alteration in such an incidental and unnecessary characteristic as this, by a person possessed of no legal title to the instrument, will have the effect of annulling such an instrument in the hands of a *bonâ fide* holder who has purchased and paid for it in the ordinary course of trade, would be to imperil all persons dealing in this species of property. It is very clear that the true principle should be, that the holder of a negotiable instrument should bear no risk arising from antecedent alterations of it, except with respect to such as have been made by a prior legal holder; and against the existence of any such imperfections in his title he has a sufficient guaranty in that common prudence that, for the most part, deters men from doing an act destructive of their own rights; whereas if he is to be held answerable for the acts of persons having no legal interest in the instrument, no safeguard whatever is provided in the nature of the transaction."[3]

IV. *Remedies upon Corporate Bonds.*

217. In an action upon a bond issued under the provisions of a railroad act authorizing a company to borrow money and issue bonds and mortgages for the purpose of completing, furnishing, or operating its road,[4] it would seem that the plaintiff ought properly to allege that the money was borrowed for the purpose provided for, and that it was necessary for that purpose.[5]

Russell, 29 N. Y. 220; City of Elizabeth *v.* Force, 29 N. J. Eq. 587.

[1] Birdsall *v.* Russell, *supra.*

[2] Spooner *v.* Holmes, 102 Mass. 503.

[3] City of Elizabeth *v.* Force, 29 N. J. Eq. 587.

[4] 2 R. S. N. Y. 1875, p. 532.

[5] Miller *v.* N. Y. & Erie R. R. Co. 8 Abb. (N. Y.) Pr. 431; 18 How. Pr. 374.

An action may be maintained upon a bond payable at a fixed time and place without allegation or proof of presentation at the time and place mentioned.[1] This is the rule applicable to a suit against the maker of a note, or the acceptor of a bill of exchange. But if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it is matter of defence to be pleaded and proved on his part.[2]

No demand of payment at the place where the bonds are made payable is necessary when the corporation is insolvent and has no funds at the place designated. The law does not exact the performance of such a fruitless act.[3]

Where bonds are made payable at the company's office in a particular place, and at the maturity of the bonds the company has no office at that place, a demand of payment elsewhere is sufficient.[4]

218. **Bonds illegally issued** cannot be actively enforced either in a court of law or a Court of Equity. Yet if a corporation which has issued such bonds comes into a Court of Equity seeking to set them aside, equitable terms may be imposed upon it; and if the corporation has had the benefit of the sums of money for which these invalid bonds had been given, it may be charged as a debtor to that extent.[5] But as already noticed, corporations may be estopped by their acts from claiming the invalidity of their bonds; and if the bonds be negotiable, purchasers for value may not be affected by their irregular or illegal issue.[6]

219. **Relief may be had in equity for the loss or destruction of negotiable bonds** and coupons. The jurisdiction of the court for this purpose, will be exercised and relief granted by ordering the issue of other bonds in place of those lost, whenever the loss or destruction of the instruments has happened without the negligence or fault of the party applying, provided such relief can be given without derogating from any positive

[1] Langston *v.* So. Carolina R. R. Co. 2 S. C. 248; First Nat. Bank of St. Paul *v.* County Commissioners of Scott County, 14 Minn. 77.

[2] Wallace *v.* M'Connell, 13 Pet. 136.

[3] Shaw *v.* Bill, 95 U. S. 10.

[4] Alexander *v.* Atlantic, Tenn. & Ohio R. R. Co. 67 N. C. 198.

[5] Cork & Youghal Ry. Co. *in re*, L. R. 4 Ch. 748; Durham County, &c., Building Soc. *in re*, L. R. 12 Eq. 521; Grand Junction Ry. Co. *v.* Bickford, 23 Grant's Ch. (Ontario) 302.

[6] See § 207.

agreement, or violating any equal or superior equity in other parties. Such relief was granted in the case of bonds stolen at the time of the evacuation of Petersburg by the Confederate forces, the bonds having been hidden in the ground for safety ;[1] and in like manner in the case of bonds stolen from the vault of a banking company.[2] It has been insisted sometimes that there is no relief in equity when the loss has occurred through theft. But equity makes no distinction in this respect.[3]

In case the lost bonds have considerable time yet to run before maturity, it is believed to be within the power of a Court of Equity to grant relief by decreeing a reissue of the bonds, upon the execution of a good and sufficient bond of indemnity to the company against the claims of *bonâ fide* holders of the bonds alleged to be lost. To enjoin the company from paying the bonds to any *bonâ fide* holder is useless and erroneous.[4]

One who has in good faith sold bonds of a private or municipal corporation which are for any reason void is not liable to the purchaser for the price paid for them, unless he has warranted their validity.[5] He is liable *ex delicto* for bad faith ; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty.[6]

220. A right of conversion into stock can be enforced only by the holder of the bond. — When bonds of a railway company, payable to the holder and assignable by delivery, are made convertible into the capital stock of the company at the pleasure of the holder, at par, the right of conversion goes with the bonds and is inseparable from them. The right of conversion is available to the holder only so long as he continues the holder, when it passes by the transfer of the bonds to the new holders. Upon the refusal of the company to make the conversion upon the demand of a holder, he has several courses open to him at his election. He may waive the right thus denied him, continue

[1] Chesapeake & Ohio Canal Co. *v.* Blair, 45 Md. 102. See § 389.

[2] Force *v.* City of Elizabeth, 27 N. J. Eq. 408.

[3] Force *v.* City of Elizabeth, *supra*.

[4] New Orleans, Jackson & Great Northern R. R. Co. *v.* Miss. College, 47 Miss. 560.

[5] Otis *v.* Cullum, 92 U. S. 447.

[6] Per Swayne, J., in Otis *v.* Cullum, *supra*.

to draw his interest as it accrues, and demand the principal at maturity; or may at any time renew his demand; or he may divest himself of all interest in the subject matter, and invest another party with all his rights, including the right of election as to the mode of performing the contract, by a sale and transfer of the bond; or he may stand upon and abide by the election and demand already made, and on his right to convert the bond into capital stock; and may by action recover, by way of damages for the breach of contract, the full market value of the stock wrongfully withheld from him. Such recovery would be a bar to any further suit on the bond, and the payment of the judgment would place the company in the legal position they would be in had they issued the stock on demand.[1] But in an action for the refusal to convert the bonds into stock, it is clear that the plaintiff must allege not only his ownership at the time of the demand for conversion, and that he then offered to surrender the bonds for cancellation, but also that he is still the owner and holder of such bonds, and now brings them into court for cancellation, upon his recovery of damages for breach of the stipulation; and an action without such allegations is fatally defective.

An option given in a railroad bond to convert it into stock within a specified time must be exercised within that time or it is forever gone, and can only be renewed, or the right to exercise it revived, by a new contract. An agreement for the extension of the time of payment of the bond cannot have that effect.[2]

221. **Bonds issued by a railroad company in the hands of a non-resident of a state are not subject to taxation** by that state. The bonds are property in the hands of the holders, and when held by non-residents they are property beyond the jurisdiction of the state. A statute requiring the treasurer of the

[1] Per Scott, C. J., in Denny *v.* Cleveland & Pittsburg R. R. Co. 28 Ohio St. 108. The convertible clause in this case was indorsed upon the bonds, over the signature of the president of the company, in the following terms: "The within bond, convertible into the capital stock of the company at the pleasure of the holder, at par, upon the surrender thereof, with the unpaid interest coupons, to the secretary of the company. By order of the directors." Denny *v.* Cleveland & Pittsburg R. R. Co. *supra*.

[2] Muhlenberg *v.* Phila. & Reading R. R. Co. 47 Pa. St. 16.

company to retain a percentage of the interest due to the non-resident bondholders is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the state. It is a law which impairs the obligation of the contract between the parties. The fact that the bonds are secured by a mortgage of property situated in the state does not confer any right to tax such bonds. The mortgage is a mere lien, and though in the form of a conveyance confers no absolute ownership. The mortgagee has a chattel interest which follows the person of the owner.[1]

The constitutional provision against impairing the obligations of contracts is a limitation upon the taxing power of a state as well as upon other legislation; and in fact this provision is more frequently violated in exercise of the taxing power than in any other mode. "No state," says Mr. Justice Strong,[2] "by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the state treasury.' Much less can a city say, 'We will tax our debt to you, and in virtue of the tax withhold a part for our own use.'" No municipality of a state can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors.[3]

A state has no power to tax the bonds of a railroad corporation whose road lies partially in two or more states, when the bonds are binding upon every part of the road.[4] If one state can tax the bonds the other can also tax them; and thus there would be a double taxation of the same property; or if the road extends through five or six states, there might be a taxation of the same property five or six times over. A state cannot properly impose a tax upon property and interests lying beyond her jurisdiction.

[1] Railroad Co. *v.* Pennsylvania: Case of the State Tax of Foreign held Bonds, 15 Wall. 300; Railroad Co. *v.* Jackson, 7 Wall. 262; Davenport *v.* Miss. & Mo. R. R. Co. 12 Iowa, 539; People *v.* Eastman, 25 Cal. 603; Commonwealth *v.* Chesapeake & Ohio R. R. Co. 27 Gratt. (Va.) 344. *Contra*, see Maltby *v.* Reading & Columbia R. R. Co. 52 Pa. St. 140.

[2] Murray *v.* Charleston, 96 U. S. 432.

[3] Murray *v.* Charleston, *supra*.

[4] Railroad Co. *v.* Jackson, 7 Wall. 262.

Railroad charters sometimes contain an exemption from taxation either total or limited; and in such case the exemption is irrepealable and inviolable.[1]

[1] Mobile & Ohio R. R. Co. *v.* Mosely, 52 Miss. 127. See Livingston County *v.* Hannibal & St. Jo. R. R. Co. 60 Mo. 516.

CHAPTER VII.

MUNICIPAL BONDS IN AID OF RAILROAD AND OTHER CORPORATIONS.

I. Power of municipalities to issue negotiable bonds in aid of private corporations, 222–230.

II. Constitutional and statutory provisions respecting municipal aid to corporations, 231–266.

III. Conditions precedent to granting municipal aid, 267–277.

IV. Ratification of bonds irregularly issued, and waiver of conditions, 278–282.

V. Negotiability of municipal securities, 283–286.

VI. Rights of *bonâ fide* holders of negotiable bonds of municipalities, 287–299.

VII. Enforcement of municipal bonds, 300–305.

I. *Power of Municipalities to issue Negotiable Bonds in aid of Private Corporations.*

222. General statement. — Municipal corporations are created solely for the purposes of local government. They are the creatures of the state, which confers upon them a portion of its governmental power, to be exercised for the specific purpose of their existence. The legislature invests them with only such powers as it deems essential to this end, and the powers conferred are at all times subject to its control. They have no powers of their own, except such as are incidental to their very existence.[1] The purposes for which municipal corporations are formed being public and governmental for the public benefit of the people within their limits, while those for which private corporations exist are the carrying on of private business for the private gain of their members, a fundamental and wide difference arises between the powers of these two classes of corporations. Thus it has been observed [2] that private corporations have the power, as incidental to their existence, to borrow money and to execute negotiable or other securities at their pleasure. But municipal corporations have no

[1] United States *v.* Railroad Co. 17 Wall. 322; Mayor *v.* Ray, 19 Wall. 468, 475; Thomson *v.* Lee County, 3 Wall. 327, 330; Carter *v.* City of Dubuque, 35 Iowa, 416.

[2] See § 128.

such powers.[1] A similar distinction, arising from their diverse purposes, exists between the conferred powers of municipal and private corporations; those of the latter assimilating closely to the powers of natural persons, while those of the former are public, and only such as will enable them to fulfil their public functions. The powers conferred upon corporations must be appropriate to the purposes for which they are created; and, therefore, the legislature itself is limited in conferring powers upon municipal corporations to such as may be exercised for public purposes.

223. Municipal corporations cannot incur debts and issue their securities for purposes not within the proper scope of such corporations, even though they have legislative sanction for such transactions. It is a fundamental principle that the power to levy taxes can only be used by municipal corporations for public purposes; and it is equally fundamental that these public purposes must be such as are contemplated in the creation and existence of such corporations. As to what are public purposes for which municipal corporations may be empowered to raise money by taxation much diversity of opinion exists, and it is not possible to reconcile all the decisions. In general, it may be said that "the object, to be a public use, must either be: (1.) something which *ipso facto*, by its mere existence and of necessity, produces some great common good to all the inhabitants of a particular district, such as sanitary measures for draining, water-supply, and the like; or (2.) it must be something in which the public at large — that is, every individual, if he pleases — has a legal interest and right, such as a highway, railroad, and the like; or (3.) it must be something directly governmental, such as a fort, a state-house, and the like."[2] Accordingly the laying out and grading of streets,[3] the locating and building of a school or university,[4] the construction of town halls,[5] of markets,[6] of water-works,[7] and of gas works,[8]

[1] Thomson *v.* Lee County, *supra;* Miller *v.* Ray, *supra.*

[2] Mr. Pomeroy's argument in Bloomfield, &c. Gas Light Co. *v.* Richardson, 63 Barb. (N. Y.) 437; People *v.* Common Council of Detroit, 28 Mich. 228; 15 Am. R. 202.

[3] Rogers *v.* Burlington, 3 Wall. 654.

[4] Hensley Township *v.* People, 84 Ill. 544.

[5] Greeley *v.* People, 60 Ill. 19.

[6] State *v.* City of Madison, 7 Wis. 688.

[7] Hale *v.* Houghton, 8 Mich. 458; Sala *v.* City of New Orleans, 2 Woods, 188; Rome *v.* Cabot, 28 Ga. 50.

[8] City of Aurora *v.* West, 9 Ind. 74.

the laying out of cemeteries and public parks,[1] and the providing of fire-engines,[2] have been held to be proper objects of municipal care, for which the legislature may authorize a municipality to borrow money and issue negotiable securities.

But a statute authorizing the city of Boston to raise money by the issue of bonds for the purpose of lending it to owners of property destroyed by the great fire was declared unconstitutional.[3] In like manner a statute of the State of Kansas, whose object was to provide the destitute with provisions, and with grain for seed, was held to be unconstitutional.[4] A statute authorizing towns to loan their credit to such persons as will engage in manufacturing for their private emolument in such towns is unconstitutional.[5] The legislature cannot take the property of one man, or the property of all tax-payers of a town, and hand it over, without consideration and without pretence of any public obligation or duty, to another, to be used by him in buying a farm, or building a house, or setting himself up in business. It is too clear for discussion that this would be a taking of private property for a private use, and would be beyond the limits of legislative power.[6]

224. **In illustration of these principles** which determine the limits of the power of municipal corporations to incur indebtedness there are numerous decisions, to a few of which only is it practicable to refer in connection with the present subject. It is premised that while the general rule, that the legitimate object of raising money by taxation is for public purposes, and the proper needs of government, general and local, state and municipal, is not anywhere disputed, yet when the inquiry is made in any case, what is a public purpose, the answer is not always ready, nor easily to be found. In general it may be said that no pinched or meagre sense may be put upon the words, and that if the purpose designed by the legislature lies so near the border line as that it may be doubtful on which side of the line such purpose is domi-

[1] County Court of St. Louis County *v.* Griswold, 58 Mo. 175.

[2] Robinson *v.* City of St. Louis, 28 Mo. 488; Mills *v.* Gleason, 11 Wis. 470.

[3] Lowell *v.* City of Boston, 111 Mass. 454.

[4] State *v.* Osawkee Township, 14 Kans. 418.

[5] Allen *v.* Inhabitants of Jay, 60 Me. 124; Commercial Bank *v.* City of Iola, 2 Dill. 353; National Bank of Cleveland *v.* City of Iola, U. S. Circuit Court, 9 Kans. 689; Ohio Valley Iron Works *v.* Town of Moundsville, 11 W. Va. 1.

[6] Perry *v.* Keene, 56 N. H. 514.

ciled, the courts may not set their judgment against that of the law makers.[1]

A statute which authorizes the issuing of bonds, to be paid by taxation, to aid in establishing or carrying on ordinary manufacturing enterprise is void, because the purpose is not a public one, although the enterprise might, in a collateral way, benefit the local public.[2] "I think it would not be claimed," said Grover, J., in a case before the Court of Appeals of New York,[3] "that a town could be compelled to become a stockholder in a banking or manufacturing corporation, although it appeared that the particular corporation would largely promote the public interest where the business was conducted. Such legislation could only be sustained by holding the power of the legislature supreme over municipal corporations for private as well as public purposes. Upon principle and authority, I think that it is not as to the former, although it is as to the latter." Moreover, the legislature may not empower a majority to compel a minority to enter into a private business, whether the form of effecting the end be by a direct statute or through the operation of taxation.[4]

The principle is forcibly stated in a leading case before the Supreme Court of Pennsylvania by Black, C. J.: "The legislature has no constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though

[1] Weismer *v.* Village of Douglas, 64 N. Y. 91, 99, substantially the language of Folger, J.

[2] Jarrott *v.* City of Moberly (U. S. C. C. W. D. Mo. April T. 1878), 5 Reporter, 683; Loan Association *v.* Topeka, 20 Wall. 655; Commercial National Bank of Cleveland *v.* Iola, 2 Dill. 353; Citizens' Savings Association of Cleveland *v.* Topeka, 3 Dill. 376; Allen *v.* Jay, 60 Me. 124; Western Saving Fund Soc. of Phila. *v.* City of Phila. 31 Pa. St. 185; Weismer *v.* Village of Douglas, 13 Am. R. 480; *S. C.* 4 Hun (N. Y.), 201; *S. C.* 64 N. Y. 91, which see for a full discussion of the subject; Curtis *v.* Whipple, 24 Wis. 350; Whiting *v.* Sheboygan & Fond Du Lac R. R. Co. 25 Wis. 167; National Bank of Cleveland *v.* Iola (U. S. C. C.), 9 Kans. 690.

[3] People *v.* Batchellor, 58 N. Y. 128, 143.

[4] Weismer *v.* Village of Douglas, 53 N. Y. 128, per Folger, J.

it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them." [1]

225. In several states there are statutes authorizing municipal aid to internal improvements, and the inquiry often arises what improvements may be promoted under this authority. The first essential characteristic of an improvement entitled to such aid is, that its purpose shall be public.[2] Railroads, turnpikes, bridges, ferries, public buildings, the reclaiming of swamps, and the like, are no doubt authorized improvements. A bridge or a turnpike which is a public thoroughfare is an internal improvement, although tolls are charged for the use of it.[3] A county having, under the authority of such a statute, voted aid for the construction of a bridge, under the belief that it had the right to exact tolls for its use, the want of power to demand tolls does not affect the validity of the bonds issued therefor. The power to aid in the construction of the bridge, and the power to stipulate for tolls thereon, are two distinct things; and whether the power to exact tolls exists or not does not in any way concern the purchaser of the bonds.[4]

Under a statute of the State of Nebraska authorizing any county or city to issue bonds to aid in the construction of any railroad or other work of internal improvement, a bridge was held to be an internal improvement within the meaning of the act.[5] The fact that the bridge, in aid of the construction of which the bonds were issued, was built as a toll-bridge, and was used as such, does not affect their validity. All bridges intended and used as thoroughfares are public highways, whether subject to toll or not. Neither does the fact that the precinct or the county commissioners had no right, without legislative authority, to demand tolls for passing the bridge affect the valid-

[1] Sharpless *v.* Mayor,&c.of Philadelphia, 21 Pa. St. 147, 168. Quoted and approved in Opinion of Judges, 58 Me. 590.

[2] Mayor of Watumpka *v.* Newton, 23 Ala. 660. "Where internal improvements under state authority are spoken of, it is universally understood that works within the state by which the public are supposed to be benefited are intended; such as the improvements of highways and channels of travel and commerce."

[3] County Commissioners *v.* Chandler, Supreme Court of the U. S. 5 Reporter, 227; 96 U. S. 205.

[4] County Commissioners *v.* Chandler, *supra.*

[5] Union Pacific R. R. *v.* Colfax County, 4 Neb. 450.

ity of the bonds. The bridge was an internal improvement, which the precinct had the power to aid; and whether it had the power to collect tolls for the use of it is a distinct thing.[1]

A statute of the State of Kansas authorized towns and counties to issue bonds "for the purpose of building bridges or to aid in the construction of railroads, water-power, or other works of internal improvement."[2] A previous statute declared all custom grist-mills to be "public mills," and regulated their management.[3] A township issued bonds which purported to be authorized by the act first named, to aid in the construction and equipment of a steam grist-mill owned by an individual. The Supreme Court of the United States declared the bonds authorized and valid, being issued in aid of "works of internal improvement" within the meaning of the act.[4]

Under a special act of the legislature of the same state a township was authorized to issue bonds for the purpose named in a vote of the township, which was to aid in the improvement of a water-power, and the putting in of a flouring-mill. The decision[5] sustaining the validity of the bonds rested upon the recital that they were issued "for the purpose of aiding internal improvements;" but Judge Dillon remarked that the legislature of the state authorized in favor of *water-mills* the exercise of the power of eminent domain, and that the Supreme Court of the state had declared that "no instance can be shown where the government may aid a thing by the power of eminent domain, where it cannot also aid it by taxation."[6]

226. A municipal corporation cannot without legislative authority issue bonds in aid of any extraneous object. Every person dealing in them must at his peril take notice of the existence and terms of the law by which it is claimed the power to issue the bonds is conferred.[7] Therefore, if the act which it was

[1] County Commissioners *v.* Chandler, 96 U. S. 205. And see Commissioners of Dodge County *v.* Chandler, U. S. Supreme Court, 1878, 5 Reporter, 227.

[2] Stat. 1872, ch. 68, p. 110.

[3] Stat. 1868, ch. 65, p. 573.

[4] Township of Burlington *v.* Beasley, 94 U. S. 310.

[5] Guernsey *v.* Burlington Township, 4 Dill. 372.

[6] Leavenworth County *v.* Miller, 7 Kans. 479, 523.

[7] Thomson *v.* Lee County, 3 Wall. 327; Pendleton County *v.* Amy, 13 Wall. 297; Kenicott *v.* Supervisors, 16 Wall. 452; St. Joseph Township *v.* Rogers, 16 Wall. 644; Town of Coloma *v.* Eaves, 92 U. S. 484; Town of So. Ottawa *v.* Perkins, 94 U. S. 260; Police Jury *v.* Britton, 15 Wall. 566; Barnes *v.* Town of Lucon,

supposed authorized the issuing of the bonds was not actually passed by the legislature, although it was published among the printed statutes of the state as a law, and therefore *primâ facie* valid, the municipal corporation which has issued bonds by virtue of the act is not estopped to deny the passage of it, although the bonds are held by a purchaser in good faith, who relied upon the published statute as valid.[1]

The power to issue railroad-aid bonds is not one of the ordinary powers of a municipality. Express authority for it is required, and thus authority must be exercised in conformity with prescribed forms.[2] But, while nothing is taken by implication, the statute is not construed with the strictness of the rules of criminal law. The officers of the county have no authority to waive any of the limitations or conditions of the statute authorizing the aid, or of the subscription itself; yet, if there be a failure on the part of the railroad company to comply with the conditions in some minor respect, such as the completion of a specified number of miles of road within a given time, and the county takes no objection, but pays the interest upon the bonds for a series of years, the action of its officers is thereby ratified, and the county prevented from recovering the bonds or their value of the railroad company.[3]

Inasmuch as municipal aid may be given to railroad companies, it follows that such aid may be given for any integral or essential part of a railroad, such for instance as the building of machine shops;[4] or the construction of depots and side-tracks of an ex-

84 Ill. 461; Town of Pana *v.* Lippincott, 10 Chicago Leg. News, 205; Delaware County *v.* McClintock, 51 Ind. 325; Clay *v.* Nicholas County Court, 4 Bush (Ky.), 154; Williamson *v.* City of Keokuk, 44 Iowa, 88; Hawkins *v.* Carroll County, 50 Miss. 735; Sykes *v.* Mayor, &c. of Columbus, 5 Reporter, 501; Ranlett *v.* Leavenworth, U. S. C. C., referred to in 1 Dill. 263; Reineman *v.* Covington, &c. R. R. Co. 7 Neb. 310; New Orleans, Mobile & Chattanooga R. R. Co. *v.* Dunn, 51 Ala. 128; Lafayette, Muncie & Bloomington R. R. Co. *v.* Geiger, 34 Ind. 185; Pennsylvania R. R. Co. *v.* City of Philadelphia, 47 Pa. St. 189; Fisk *v.* City of Kenosha, 26 Wis 23.

[1] Town of South Ottawa *v.* Perkins, 94 U. S. 260.

[2] Blake *v.* Mayor, &c. of Macon, 53 Ga. 172; Lewis *v.* Bourbon County, 12 Kans. 186; Barnes *v.* Town of Lacon, 84 Ill. 461; Hopple *v.* Hipple, Sup. Ct. Com. of Ohio, 1878, 7 Cent. L. J. 75; M'Dermond *v.* Kennedy, Bright. (Pa.) 332; Pennsylvania R. R. Co. *v.* Philadelphia, 47 Pa. St. 189.

[3] Leavenworth, Lawrence & Galveston R. R. Co. *v.* Douglas County, 18 Kans. 169; 15 Am. Railw. R. 256.

[4] Jarrott *v.* City of Moberly, 5 Reporter, 583, per Dillon, J.

isting railroad.[1] The cost of such constructions is always chargeable to construction account, and not to repairs or expenses of operation.

In like manner a municipality must have legislative authority to subscribe to the capital stock of a bridge company, or of any other private corporation, before it is bound by its bonds issued therefor, even in the hands of *bonâ fide* purchasers.[2]

227. It is well established that railroads are of such general public advantage that municipal corporations may be authorized by legislation to aid in their construction or maintenance, except so far as such legislation is prohibited or restrained by constitutional provisions.[3] In view of the great abuse of this power by municipal corporations whereby an unsupportable burden of debt has been placed upon towns, cities, and counties, in portions of the country, regrets have often been expressed by judges and legal writers that the authority of legislatures to authorize the giving of aid to such enterprises was ever recognized to be constitutional;[4] but in view

[1] Township of Rock Creek *v.* Strong, 96 U. S. 271.

[2] McClure *v.* Township of Oxford, 94 U. S. 429.

[3] Gelpcke *v.* City of Dubuque, 1 Wall. 175; Mitchell *v.* Burlington, 4 Wall. 270; Township of Pine Grove *v.* Talcott, 19 Wall. 666; Rogers *v.* Burlington, 3 Wall. 654; Olcott *v.* Supervisors, 16 Wall. 678; Railroad Co. *v.* County of Otoe, 16 Wall. 667; Loan Association *v.* Topeka, 20 Wall. 655; St. Joseph Township *v.* Rogers, 16 Wall. 644; Davidson *v.* Ramsey County, 18 Minn. 482; Quincy, Missouri & Pacific R. R Co. *v.* Morris, 84 Ill. 410; Perry *v.* Keene, 56 N. H. 514; Reineman *v.* Covington, &c. R. R. Co. 7 Neb. 310; Harcourt *v.* Good, 39 Tex. 455, where many cases are referred to in the opinion of Walker, J.; Cincinnati, Wilmington & Zanesville R. R. Co. *v.* Clinton County, 1 Ohio St. 77; Bridgeport *v.* Housatonic R. R. Co. 15 Conn. 475; Goddin *v.* Crump, 8 Leigh (Va.), 120; Nichol *v.* Mayor, &c. of Nashville, 9 Humph. (Tenn.) 252; Louisville & Nashville R. R. Co. *v.* County of Davidson, 1 Sneed, 637; Leavenworth, Lawrence & Galveston R. R. Co. *v.* Douglas County, 18 Kans. 169; City of San Antonio *v.* Lane, 32 Tex. 405; Winn *v.* City of Macon, 21 Ga. 275; People *v.* Mitchell, 35 N. Y. 551; Commonwealth *v* Pittsburg, 41 Pa. St. 278; Sharpless *v.* Mayor, &c. of Phila. 21 Pa. St. 147; Commonwealth *v.* Perkins, 43 Ib. 400; Borough of North Lebanon *v.* Arnold, 47 Ib. 489; Augusta Bank *v.* Augusta, 49 Me. 507; Society for Savings *v.* City of New London, 29 Conn. 174; City of Aurora *v.* West, 9 Ind. 74; 22 Ib. 88; Marshall *v.* Silliman, 61 Ill. 218; Butler *v.* Dunham, 27 Ill. 474; Chicago, Rock Island & Pacific R. R. Co. *v.* City of Joliet, 79 Ill. 25; Com. of Leavenworth County *v.* Miller, 7 Kans. 479; 12 Am. R. 425; Davidson *v.* Ramsey County, 18 Minn. 482; City of St. Louis *v.* Alexander, 23 Mo. 485; Chicago, Burlington & Quincy R. R. Co. *v.* County of Otoe, 2 Neb. 496; Lawson *v.* Milwaukee & Northern Ry. Co. 30 Wis. 597; Robinson *v.* Bidwell, 22 Cal. 379; Stein *v.* Mayor, &c. of Mobile, 24 Ala. 591; Slack *v.* Maysville & Lexington R. R. Co. 13 B. Mon. (Ky.) 1; Hill *v.* Forsythe County, 67 N. C. 367.

[4] "Look not thou upon the voting of

of the general recognition of the propriety of such legislation it is too late now to question the constitutional right of states to authorize the granting of aid to such corporations. The only remedy for the evil is by constitutional provisions restricting or prohibiting such legislation; and accordingly, within a few years, provisions for this purpose have been placed in the constitutions of several of the states.

Such legislation in aid of railroads is supported upon the ground that the building of them is a public affair; and that they are public highways for the public benefit. "The public has an interest in such a road, when it belongs to a corporation, as clearly as they would have if it were free, or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth."[1] Neither does the fact that the corporation has the right to exact reasonable tolls from those who use the road make its main use a private one. The company is private, but its functions are public. The state itself may construct and maintain a railroad at the public expense. It may aid a private corporation to do so by an exercise of the right of taxation, and of the right of eminent domain as well; and it has as clear a constitutional right to allow a particular portion of the people to tax themselves to promote the building of a railroad in which they have an interest.[2]

The fact that the railroad, in aid of which a city or county makes a subscription, lies wholly in another state does not necessarily make the subscription one any the less for a public purpose.[3] Such a railroad may greatly promote the general prosperity and welfare of the county or city. Thus it was recently held that the city of Quincy in Illinois, situated upon the eastern bank of the Mississippi River, might properly aid in the construc-

railroad bonds when it is new, for at the last it biteth like a serpent, and stingeth like an adder." Per Brewer, J., Leavenworth, Lawrence & Galveston R. R. Co. *v.* Douglas County, 18 Kans. 169, 184.

[1] Per Black, C. J., in Sharpless *v.* Mayor, &c. of Phila. 21 Pa. St. 147, 169.

[2] Sharpless *v.* Mayor, &c. of Phila. *supra.*

[3] Railroad Co. *v.* County of Otoe, 16 Wall. 667; Bell *v.* Railroad Co. 4 Wall. 598; Walker *v.* City of Cincinnati, 21 Ohio St. 14; St. Joseph & Denver City R. R. Co. *v.* Buchanan County Court, 39 Mo. 485.

tion of a railroad lying in the State of Missouri, running from a point on the western bank of the river opposite the city of Quincy to a point westward in Nebraska.[1]

228. **Public policy chiefly determines what is a public use,** for which the power of taxation may be exercised. This whole subject was ably discussed in the recent case of *Perry* v. *Keene*, in New Hampshire.[2] It was there declared that the rule by which to determine whether an object is a public one for which the legislature may properly authorize the levying of taxes is furnished not so much by the law as by general considerations of public policy and political economy; and that, tested by this rule, a railroad is such a public object. Upon this part the of subject Mr. Justice Ladd said: "No one doubts that the building and maintaining of our common highways is a public purpose. Why? Certainly for no other reason than that they furnish facilities for travel, the transmission of intelligence, and the transportation of goods. But why should the state take this matter under its fostering care, imposing upon the people a very great yearly burden in the shape of taxes for their support, any more than many others that might be mentioned, of equal and perhaps greater importance to its citizens? Is it of greater concern to the citizen that he should have a road to travel on, when he desires to visit his neighbor in the next town, or transport the products of his farm or of his factory to market and bring back the commodities for which they may be exchanged, than that he should have a mill to grind his corn, a tanner, a shoemaker, and a tailor, to manufacture his raw material into clothing, wherewith his body may be covered? Doubtless highways are a great public benefit. Without them I suppose the whole state would soon return to its primal condition of a howling wilderness, fit only for the habitation of wild beasts and savages. How would it be if there were no mills for the manufacture of lumber, no joiners or masons to build houses, no manufacturers of cloth, no merchants or tradesmen to assist in the exchange of commodities? These suppositions may appear somewhat fanciful, but they illustrate the inquiry, Why is the building of roads to be regarded as a public service, while many other

[1] Quincy, Mo. & Pacific R. R. Co. *v.* Morris, 84 Ill. 410.

[2] 56 N. H. 514. See, in this connection, Weismer *v.* Village of Douglas, 64 N. Y. 91, 99.

things equally necessary for the upholding of life, the security of property, the preservation of learning, morality, and religion, are by common consent regarded as private, and so left to the private enterprise of the citizens? The answer to this question, surely, is not to be found in any abstract principle of law. It is essentially a conclusion of fact and public policy, the result of an inquiry into the individual necessities of every member of the community (which in the aggregate show the character and urgency of the public need), and the likelihood that these necessities will be supplied without interference of the state. Obviously it bears a much closer resemblance to the deduction of a politician than the application of a legal principle by a judge. Should it be found by experience that no person in the state would, voluntarily and unaided, establish and carry on any given trade or calling, necessary and universally admitted to be necessary for the upholding of life, the preservation of health, the maintenance of decency, order, and civilization among the people, would not the carrying on of such necessary trade or calling thereupon become a public purpose, for which the legislature might lawfully impose a tax?

"Experience shows that highways would not be built, or, if built, would not be located in the right places with reference to convenient transit between distant points, nor kept in suitable repair, but for the control assumed over the whole matter by the state; and so the state interferes, and establishes a system, and imposes an enormous burden upon the people, in the shape of taxes, compelling them to supply themselves with what they certainly need, but need no more than they need shoes or bread, — and nobody ever complained that the interference was unauthorized, or the purpose other than a public one."

To the objection that railroad corporations are private; that the roads are built and run for private gain; that the public can only enjoy the benefits offered them upon payment of a toll, the answer conclusively made is, that the character of the agency employed does not determine the nature of the end to be secured; that if the purpose is public, it makes no difference that the agent by whose hand it is attained is private. In conclusion it was said that a railroad must be regarded as a public purpose for which the power of taxation may be exercised, inasmuch as it is universally admitted that it is such a public use as affords just ground for the taking of private property and appropriating it to that use.

229. There are a few decisions, however, which hold that the construction of a railroad is not an object for which a municipal corporation can exercise the power of taxation, and is not an object for which the legislature can confer such power.[1] The power of taxation can be exercised only for a public purpose. In determining what is a public purpose, it is said that the urgency of the public need, or the extent of the public benefit which is to follow, is not conclusive. It designates rather an object for which, according to settled usage, the government may provide, as distinguished from an object which, by like usage, is left to private enterprise. Moreover, a public purpose of general interest throughout the state is essential to the exercise of the power of taxation by the state, while a public purpose of general interest throughout a municipal subdivision of a state is essential to the exercise of that power by such municipal subdivision. A railroad, however, is regarded as a private enterprise; and although an incidental benefit may accrue to the public from such enterprise, yet that benefit does not afford a ground for imposing burdens upon the public by way of taxation in behalf of such enterprise.

[1] **Michigan** seems to be the only state in which the courts have persisted in holding that such legislation is incompetent and invalid; and these decisions have been set aside by the Supreme Court of the United States. See § 246.

In **New York** the validity of enabling acts, authorizing municipal corporations to subscribe for stock, and to issue bonds in aid of railroads, was first considered by the Court of Appeals in Bank of Rome *v.* Village of Rome, 18 N. Y. 38, and the constitutionality of such legislation was there distinctly affirmed, although there had been a decision against it by the Supreme Court. Clark *v.* City of Rochester, 13 How. Pr. 204; *S. C.* reversed on appeal, 24 Barb. 446. When this case came before the Court of Appeals, this point, in view of the decision in Bank of Rome *v.* Village of Rome, was not insisted upon. 28 N. Y. 605. The validity of such legislation was acquiesced in by several cases involving the regularity of proceedings under enabling acts. In People *v.* Batchellor, 53 N. Y. 128, the Court of Appeals held that a mandamus would not lie to compel a town to issue bonds and subscribe for stock in a railroad company under a mandatory act of the legislature; but the validity of the acts was not questioned. In Williams *v.* Town of Duanesburgh, 66 N. Y. 129, a majority of the court was of opinion that the case of People *v.* Batchellor, had not in any way overruled the prior decisions in favor of such legislation.

In **Iowa** some of the earlier decisions were against the constitutionality of such legislation. See, particularly, the able opinion of Dillon, C. J., in Hanson *v.* Vernon, 27 Iowa, 28. But this and other decisions to the same effect were soon overruled. See § 240.

In Township of Pine Grove *v.* Talcott, 19 Wall. 666 (1873), Swayne, J., said that legislation of this character had been had in twenty-one states; and that in all of them but two the validity of it had been sustained by the highest local courts. The exceptions are the states of Michigan and Iowa above mentioned.

This view of the subject is very ably presented by Judge Cooley, of Michigan:[1] "On the ground of local benefit, a small district of the state is to be taxed to encourage a local enterprise, which it is supposed will be of such peculiar local advantage that this district rather than the state at large, or any greater or smaller portion of the state, should contribute to its construction. The road, when constructed, is nevertheless to be exclusively private property, owned, controlled, and operated by a private corporation for the benefit of its own members, and to be subject to the supervision and control of the state only as other private property is, with such few exceptions as the state in granting the corporate powers has stipulated for in order to secure impartiality in the management of its business, and to prevent extortion. Primarily, therefore, the money, when raised, is to benefit a private corporation; to add to its funds and improve its property; and the benefit to the public is to be secondary and incidental, like that which springs from the building of a grist-mill, the establishment of a factory, the opening of a public inn, or from any other private enterprise which accommodates a local want and tends to increase local values. A railroad, however, it is said, is a public highway, and as such its construction is a public purpose, which may be accomplished through the instrumentality of the sovereign power of eminent domain, even when individuals, and not the state, are to own and control it. This argument is supposed to possess great force, and it therefore becomes our duty to examine it with some care. It is true that a railroad in the hands of a private corporation is often spoken of as a public highway, and that it has been recognized as so far a public object as to justify the appropriation of private property for its construction; but this fact does not conclusively determine the right to employ taxation in aid of the road in the like case. Reasoning by analogy from one of the sovereign powers of the government to another is exceedingly liable to deceive and mislead. An object may be *public* in one sense and for one purpose, when in a general sense and for other purposes it would be idle and misleading to apply the same term."

[1] People *v.* Township of Salem, 20 Mich. 452, Graves, J., dissenting. In Township of Pine Grove *v.* Talcott, 19 Wall. 666, 677, Swayne, J., in the judgment of the Supreme Court of the United States setting aside this case, declared the dissenting opinion to be unanswered. See § 246.

In a subsequent case,[1] the same learned judge said: "Another fatal objection to all this legislation upon which the majority of the court were then agreed was not fully developed, though referred to when our judgment was declared. As we then stated, the power to impose such taxation, if existing at all, could not come from, and was not aided by, the municipal votes. The legislature would have exactly the same power to impose the taxation without the assent of the municipalities that it would have to permit it with their assent. If they were allowed to vote upon that question, the permission would be of favor and not of right. The authority must come from the plenary power of the legislalature over the whole subject of taxation, which it would exercise upon the municipalities in its discretion. It might seem fairer to the people concerned to permit them to vote upon the question; but in some particulars the very permission would work an injustice. For it needs no argument to show that if a railroad through many municipalities is a public object, which may be aided by the taxation of all, there is no mode in which the aid can be given consistent with any recognized theory of taxation, without an apportionment of the burden by some rule or upon some basis among them all. This might be done if the legislature prescribed the tax; but it would be impossible under a system under which one township might tax itself ten per cent. of its valuation, another equally benefited by the same object refuse to pay but one, and a third decline altogether to bear any share of the common burden. The result of legislation like this would be, that the legislature would be requiring these several municipalities to tax themselves for an object common to them all, but without even a pretence of an apportionment of the burden."

230. The want of power in a municipal corporation to issue bonds is always open to inquiry whether the bonds be in the hands of the party to whom they were issued, or have passed into the hands of *bonâ fide* purchasers.[2] Every purchaser of such bonds must take notice of all the provisions of the statute giving authority to issue the bonds, and of any constitu-

[1] Bay City *v.* State Treasurer, 23 Mich. 499.

[2] Dillon's Municip. Bonds, § 19; Township of East Oakland *v.* Skinner, 94 U. S. 255; Ryan *v.* Lynch, 68 Ill. 160; Delaware County *v.* McClintock, 51 Ind. 325; Barnes *v.* Town of Lacon, 84 Ill. 461; Sykes *v.* Mayor, &c. of Columbus, Sup. Ct. of Miss. 1878, 5 Reporter, 501.

tional provision affecting such authority.[1] Such bonds being absolutely void, no tax can be legally collected to pay them or the interest accruing upon them; and if the tax be actually collected, any tax-payer may restrain the collector from paying over the money arising from such illegal tax.[2]

A charter of a railroad company whose route was limited to the north side of the Missouri River provided that counties in which a part of the route of the road might pass or be located might subscribe for its stock. A county on the south side of the river, in which no part of the road was constructed or located, issued its bonds in aid of the road without other legislative authority, and the bonds were held void in the hands of a *bonâ fide* holder.[3]

Authority given to a municipal corporation to subscribe for stock in a railroad company "as fully as any individual," authorizes the corporation to issue negotiable bonds in payment for the stock.[4] Authority given to a city "to borrow money for any object in its discretion,"[5] or authority to "borrow money for any public purpose,"[6] authorizes it to subscribe for the stock of a railroad, and to borrow money on its negotiable bonds to pay for it

Authority to aid a railroad by subscriptions may be implied from a statute which recognizes the power, though it does not express it in terms.[7]

A distinction has been taken in some cases that while a municipal corporation may be empowered to subscribe for the stock of a railroad company, it cannot be empowered to issue bonds and give the proceeds to such company;[8] but the better opinion is, that as respects legislative power donations and subscriptions for stock stand on the same ground.[9]

[1] Williamson *v.* City of Keokuk, 44 Iowa, 88.

[2] Newton *v.* Kerch, 9 Hun (N. Y.), 355.

[3] Sherrard *v.* Lafayette County, 3 Dill. 236; State *v.* Saline County, 51 Mo. 350.

[4] Commonwealth *v.* Pittsburg, 41 Pa. St. 278; Seybert *v.* City of Pittsburg, 1 Wall. 272.

[5] Meyer *v.* City of Muscatine, 1 Wall. 384, 387.

[6] Rogers *v.* Burlington, 3 Wall. 654. In this case the bonds were issued directly to the railroad company, and Chase, C. J., and Field, Miller, and Grier, JJ., dissented, on the ground that this was a loan of credit and not a borrowing of money. See Starin *v.* Town of Genoa, 23 N. Y. 439, 454.

[7] Gelpcke *v.* City of Dubuque, 1 Wall. 175, 220.

[8] Whitney *v.* Sheboygan & Fond du Lac R. R. Co. 25 Wis. 167; Phillips *v.* Town of Albany, 28 Wis. 340; Sweet *v.* Hulbert, 51 Barb. (N. Y.) 312.

[9] Town of Queensbury *v.* Culver, 19 Wall. 83.

Authority to subscribe for stock of a railroad and issue bonds therefor does not authorize the extending of aid to the railroad company by indorsing its bonds.[1]

II. *Constitutional and Statutory Provisions respecting Municipal Aid to Corporations.*

231. General statement. — Great abuse of the power of municipal corporations with legislative sanction to aid private corporations in constructing railroads and other public improvements has led to the adoption, in most of the states, of constitutional provisions against the granting of such aid. In some instances this inhibition has been extended also to the state itself; while in others the restriction is applied to the granting of aid by the state, but the legislature is left free to authorize counties and municipalities to give such aid. A restriction upon the legislative power to authorize municipal divisions of the state to grant such aid does not apply to such action by the state itself;[2] and on the other hand a restriction upon the state does not apply to counties and municipalities of the state.[3]

232. Alabama.[4] — The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation. The general assembly shall have no power to authorize any county, city, town, or other subdivision of this state, to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise.

Under the former Constitution of the state a general law authorizing counties, cities, and towns to subscribe for stock in railroad companies, on a vote of the citizens at a special election held for that purpose, was enacted,[5] and sustained by the courts.[6]

[1] Blake *v.* Mayor, &c. of Macon, 53 Ga. 172.

[2] Dillon on Mun. Corp. § 90; Cooley on Const. Lim. 218.

[3] Gelpcke *v.* City of Dubuque, 1 Wall. 175, 204; Cass *v.* Dillon, 2 Ohio St. 607; Johnson *v.* Stark County, 24 Ill. 75; Slack *v.* Maysville & Lexington R. R. Co. 13 B. Mon. (Ky.) 1, 16; Clark *v.* Janesville, 10 Wis. 136; Thompson *v.* City of Peru, 29 Ind. 305; Patterson *v.* Supervisors, 13 Cal. 175.

[4] Const. 1875, art. 4, §§ 54, 55.

[5] Act of Dec. 31, 1868.

[6] *Ex parte* Selma & Gulf R. R. Co. 45

233. Arkansas.[1] — No county, city, town, or other municipal corporation shall become a stockholder in any company, association, or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution, or individual. Under the former Constitution of the state municipal aid to railroad companies was allowed, and there were general laws authorizing such aid.[2]

234. California.[3] — The Constitution of the state provides that the credit of the state shall not in any manner be given or loaned to or in aid of any individual, association, or corporation, nor shall the state, directly or indirectly, become a stockholder in any association or corporation.

By statute[4] it is provided that the several counties, including the city and county of San Francisco, shall be authorized to aid in the construction of railroads by the issue of county bonds bearing interest at the rate of not exceeding seven per cent. per annum, and payable within twenty years from the date of their issue, and to provide by taxation for the payment of the interest and principal of said bonds; provided, that the whole amount of said bonds thereby authorized to be issued shall not exceed five per cent. of the value of the taxable property of said county, or city and county, according to its valuation on the assessment roll last preceding the time of the issue of said bonds.

Before the granting of such aid, the board of supervisors of the county, or city and county, proposing to grant such railroad aid, shall submit to the qualified electors of said county, or city and county, at an election, of which election at least thirty days' notice shall be given by publication once a week in a newspaper published in said county, the question whether such railroad aid shall be granted, in which notice the day on which and the places where such election is to be held shall be stated; and the route for which aid is proposed to be granted shall be definitely described, and the amount of bonds to be issued shall be stated.

Ala. 696; Fielder *v.* Montgomery & Eufaula R. R. Co. 51 Ala. 178.

[1] Const. 1874, art. xii. § 5.

[2] See Act passed July 21, 1868, which took effect ninety days from April 10, 1869; State of Arkansas *v.* Little Rock, Miss. River & Tex. Ry. Co. 31 Ark. 701.

[3] Const. 1849, art. xi. § 10.

[4] Statutes 1870, ch. 5007, §§ 1, 2. On construction of this statute see Coleman *v.* Board of Supervisors of County of Marion, 50 Cal. 493.

All elections authorized under the act shall be conducted in the same manner as elections for state and county officers. No aid to railroads shall be granted unless a majority of the electors voting at such election shall cast their votes in favor of such aid.

235. Colorado.[1] — Neither the state, nor any county, town, township, or school-district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or a joint-owner with any person, company, or corporation, public or private, in or out of the state. The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any country or municipal subdivision of the state a new liability in respect to transactions or considerations already past.[2]

236. Florida.[3] — The credit of the state shall not be pledged or loaned to any individual, company, corporation, or association; nor shall the state become a joint-owner or stockholder in any company, association, or corporation. The legislature shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain, or to appropriate money for, or to loan its credit to, any corporation, association, institution, or individual.

Before the adoption of these provisions municipal aid to railroad companies was authorized by statute,[4] and such acts were held to be constitutional.[5]

237. Georgia.[6] — The credit of the state shall not be pledged or loaned to any individual, company, corporation, or association, and the state shall not become a joint-owner or stockholder in any company, association, or corporation. The general assembly shall not authorize any county, municipal corporation, or political divi-

[1] Const. 1876, art. xi. § 2. By a general law subscriptions in aid of railroads were formerly allowed. R. S. 1867, 134.

[2] Const. 1876, art. xv. § 12.

[3] Amend. Const. 1875, art. 3, § 7. See also Const. 1868, art. xii. § 8. See Holland *v.* State of Florida, as to construction and application of these provisions.

[4] See Internal Improvement Act of January 6, 1855.

[5] County Commissioners of Columbia County *v.* King, 13 Fla. 451.

[6] Const. 1877, art. 7, §§ 5, 6.

sion of this state to become a stockholder in any company, corporation, or association, or to appropriate money for, or to loan its credit to, any corporation, company, association, institution, or individual, except for purely charitable purposes.

The Constitution of 1868 provided that any town or city might take stock in any railroad or work of public improvement, or contribute to the aid thereof, after a majority of the qualified voters of such town or city, voting at an election held for the purpose, had voted in favor of the same.[1]

238. Illinois.[2] — The credit of the state shall not, in any manner, be given to, or in aid of, any individual, association, or corporation. No county, city, town, township, or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation.

Subscriptions by counties and towns in aid of railroads were allowed under the previous Constitution, and there were general laws authorizing such subscriptions.[3]

239. Indiana.[4] — The Constitution of the state provides that no county shall subscribe for stock in any incorporated company, unless the same be paid at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company; nor shall the general assembly ever, on behalf of the state, assume the debts of any county, city, town, or township, nor of any corporation whatever.

By statute[5] it is provided that whenever a petition shall be presented to the board of commissioners of any county, signed by twenty-five freeholders of any township of such county, asking such township to make an appropriation of money to aid a railroad company, named in the petition, and then duly organized under

[1] Const. 1868, art. iii. § 6, pl. 4.

[2] Const. 1870, art. iii. § 38; art. xiv. additional section.

[3] Laws Nov. 1, 1849, and March, 1, 1854; R. S. 1869, pp. 552, 553.

[4] Const. 1851, art. x. § 6.

[5] Act March 12, 1869, provides for a legitimate exercise of the power of counties to subscribe for stock. Lafayette, Muncie & Bloomington R. R. Co. *v.* Geiger, 34 Ind. 185; Crawford County *v.* Louisville, New Albany & St. Louis Air Line Ry. Co. 39 Ind. 192. As to construction of statute, see, also, State *v.* Wheadon, 39 Ind. 520; Bronenberg *v.* Madison County, 41 Ind. 502; Alvis *v.* Whitney, 43 Ind. 83; Crooke *v.* Daviess County, 36 Ind. 320.

the laws of the state, in constructing a railroad in or through such township, by taking stock in, or donating money to, such company, not exceeding two per centum upon the amount of taxable property of such township on the tax duplicate of the county delivered to the treasurer of the county for the preceding year, it shall be the duty of such board of commissioners, after being satisfied that such petition has been properly signed by the requisite number of freeholders of such township, to cause the same to be entered at full length upon their records, and to order an election. If a majority of the votes be in favor of such railroad appropriation, the board of commissioners is required to levy a tax to meet it.[1]

It is to be observed that the constitutional restriction applies to counties only. Accordingly it is provided by statute that any incorporated city shall have power to borrow money for the purpose of subscribing to the stock of any railroad running into or through such city, and to make donations in money or bonds of such city in aid of such roads, on petition of a majority of the resident freeholders, provided that such donations shall not be payable until the roads are so far completed as to admit of the running of trains. Provision is made for a tax to pay the interest, and to create a sinking fund for the payment of the principal.[2] This statute authorizes the giving of aid either by subscriptions to stock or by donations.[3]

240. Iowa.[4] — The Constitution provides that the credit of the state shall not in any manner be given, or loaned to, or in aid of, any individual, association, or corporation; and that the state shall

[1] Act May 12, 1869, amended March 17, 1875; 1 R. S. 1876, pp. 736–739. By Act Dec. 17, 1872, a tax-payer who has paid taxes levied under Act May 12, 1869, was entitled to a certificate of the amount paid by him, if demanded before January 1, 1874, and to stock from the railroad aided for the amount of the tax paid. 1 R. S. 1876, p. 740. See Lucas *v.* Tippecanoe County, 44 Ind. 524.

By Act Dec. 14, 1872, 1 R. S. 1876, p. 742, counties bordering on state lines, or rivers forming state boundaries, and townships and cities in such counties, are enabled to aid in the construction of railroads opposite such counties in other states; and cities and towns are authorized to issue bonds for subscriptions made in aid of such roads.

[2] 1 R. S. 1876, p. 298, § 60; Act March 14, 1867. See, also, Act May 4, 1869. For construction, see City of Kokomo *v.* State, 57 Ind. 152; Noble *v.* City of Vincennes, 42 Ind. 125. The statute is constitutional. City of Mount Vernon *v.* Hovey, 52 Ind. 563.

[3] Indiana North & South Ry. Co. *v.* City of Attica, 56 Ind. 476.

[4] Const. 1857, art. vii. § 1; art. viii. § 3.

not become a stockholder in any corporation; nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state.

In 1853 the Supreme Court of the state decided that a county had the constitutional right to aid in the construction of a railroad,[1] as authorized by the Code of 1851.[2] In 1859 this court overruled its former decisions on this subject, and held that a county had no power to issue bonds in aid of railroads.[3] The Supreme Court of the United States disregarded the latter decisions, and affirmed the former.[4]

Municipal corporations were, by statute passed in 1860, prohibited from taking stock in any plank road, turnpike, or railroad company, or in any way using their credit in aid of such corporations.[5]

In 1868 municipal corporations were authorized to aid in the construction of railroads.[6] In the following year this act was declared by the Supreme Court not to be a valid or legitimate exercise of the taxing power.[7] In 1870 the legislature of this state reasserted its authority, and reënacted the law with some modifications;[8] and the same year the Supreme Court sustained the act as constitutional, overruling the decisions against the constitutionality of acts in aid of railroad companies.[9]

By recent statutes,[10] any township, incorporated town, or city, may aid in the construction of any projected railroad in this state.

Whenever a petition shall be presented to the council or trustees of any incorporated town or city, or trustees of any township,

[1] Dubuque County *v.* Dubuque & Pacific R. R. Co. 4 Greene (Iowa), 1. Followed in State *v.* Bissell, Ib. 328; Clapp *v.* County of Cedar, 5 Iowa, 15; McMillen *v.* Boyles, County Judge, 6 Iowa, 304.

[2] § 114, Code 1851.

[3] Stokes *v.* County of Scott, 10 Iowa, 166. Followed in State *v.* County of Wapello, 13 Iowa, 388; Myers *v.* County of Johnson, 14 Iowa, 47; McMillan *v.* Boyles, 14 Iowa, 107; Ten Eyck *v.* Mayor of Keokuk, 15 Iowa, 486; Chamberlain *v.* City of Burlington, 14 Iowa, 395; McClure *v.* Owen, 26 Iowa, 243.

[4] Gelpcke *v.* City of Dubuque, 1 Wall. 175.

[5] Act March 30, 1860; Rev. 1860, § 1345; Code 1873, p. 98, § 553.

[6] Laws 1868, ch. 48, p. 54.

[7] Hanson *v.* Vernon, 27 Iowa, 28. Ch. J. Dillon delivering the leading opinion, and ably sustaining the view that railroads are private corporations, and that their undertakings can no more be aided by taxation than can the undertakings of any other private corporation, or of an individual.

[8] Laws 1870, April 12.

[9] Stewart *v.* Board of Supervisors of Polk County, 30 Iowa, 9. Followed in Bonnifield *v.* Bidwell, 32 Iowa, 149; Jeffries *v.* Lawrence, 42 Iowa, 498.

[10] Laws 1876, ch. 123.

signed by a majority of the resident freehold tax-payers of such township, incorporated city or town, asking that the question of aiding in the construction of any railroad be submitted to the voters thereof, it shall be their duty to immediately give notice of a special election, by publication in some newspaper published in the county, if any be published therein, and also by posting said notice in five public places of such township, incorporated city or town, at least twenty days before said election, which notice shall specify the time and place of holding said election, the line of railroad proposed to be aided, the rate per centum of tax to be levied, and whether the entire per centum voted is to be collected in one year, or one half collected the first year and one half the following year; and the amount of work upon said proposed railroad line required to be completed before said tax shall be paid to the railroad company, and where the same shall be performed, and to what point said road shall be fully completed, and any other conditions which shall be performed before such tax shall become due, collectible, and payable; and in no case shall such tax become due, collectible, or payable until the road is fully completed to such point as mentioned in the notice. At such election the question of taxation shall be submitted, and if a majority [1] of the votes polled be "for taxation," then the recorder of the incorporated town, the city clerk, township clerk, or clerk of said election, shall forthwith certify to the county auditor the rate per centum of the tax thus voted by such township, incorporated town or city, the year or years during which the same is to be collected, and the time and terms upon which the same, when collected, is to be paid to the railroad company, under the conditions and stipulations in the said notice, together with an exact copy of the notice under which such election was held; which said county auditor shall at once cause to be recorded in the office of the recorder of deeds of the county. When such certificate shall have been made and recorded, the board of supervisors of the county shall, at the time of levying the ordinary taxes next following, levy such taxes as are voted under the provisions of this act as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, incorporated city or town. Said taxes shall be collected at the time or times specified in said order in the same manner, and be subject to the same penalties for non-

[1] Laws 1878, ch. 157.

payment after they are collectible as other taxes, or as may be stated in the petition asking said election. The aggregate amount of tax to be voted or levied under the provisions of this act in any township, incorporated town or city, shall not exceed five per centum of the assessed value of the property therein respectively. It shall be the duy of the county treasurer when required, in addition to a tax receipt, to issue to each tax-payer, on his payment of taxes voted in aid of a railroad company under the provisions of this act, a certificate showing the amount of tax by him paid in aid of said railroad company, and when the same was paid. Said certificates are assignable, and when presented by any person holding the legal title thereto to the president, managing director, treasurer, or secretary of the railroad company receiving the taxes paid as shown by said certificate, in amount showing the sum of one hundred dollars or more of taxes to have been paid for said railroad company, it shall be and is hereby made the duty of said railroad company to issue or cause to be issued to said person the amount of stock covered by said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of said stock, then the holder aforesaid of such certificate or certificates shall be entitled to receive of said stock the number of shares next greater than the amount covered by said certificates, upon making up the deficiency in money or tendering the same with the said certificates, the said stock to be estimated for the purposes hereof at its par value.

First mortgage bonds may be issued and taken instead of stock.[1]

241. Kansas.[2] — It is provided by statute that whenever two fifths of the resident tax-payers of any county, or two fifths of the resident tax-payers of any municipal township, shall petition in writing the board of county commissioners, or whenever two fifths of the resident tax-payers of any incorporated city shall petition the mayor and council of such city to submit to the qualified voters of such county, township, or city a proposition to subscribe to the capital stock of, or to loan the credit of such county, town-

[1] Laws 1878, ch. 173.

[2] Laws 1877, ch. 142, § 1. See Laws 1877, chs. 143, 144; also ch. 141, relating to aid in constructing narrow gauge railroads. Also Laws 1876, ch. 106.

ship, or city to any railroad company constructing or proposing to construct a railroad through or into such county, township, or city, the county commissioners for such county or township, or the mayor and council for such city, shall cause an election to be held to determine whether such subscription or loan shall be made; but no county shall issue under the provisions of this act more than one hundred thousand dollars and an additional five per cent. indebtedness of the assessed value of such county; and no township shall be allowed to issue more than fifteen thousand dollars and five per cent. additional of the assessed value of such township; and in no case shall the total amount of county, township, and city aid to any railroad company exceed four thousand dollars per mile for each mile of railroad constructed in said county.

It was in 1873 provided by statute that all bonds heretofore or hereafter legally authorized and issued by a vote of its electors in any county or township shall become a lien upon all the real estate in such county or township for the payment of the principal and interest of such bonds.[1]

242. Louisiana.[2] — It is provided by statute that it shall be lawful for the police juries and municipal corporations of this state to subscribe to the stock of corporations undertaking works of internal improvement, under the laws of this state, on complying with the provisions hereinafter set forth.

All ordinances passed for such subscriptions shall contain the following provisions, namely: a statement of the number and amount of shares proposed to be subscribed; and also a levy of a tax on the landed estate, situated in the parish or municipal corporation, sufficient to pay the amount of the subscription, and specifying the rate of taxation, and the time when it shall be payable.

No ordinance shall be valid or take effect until it shall have been approved and ratified by a majority of the voters on whose property the tax is proposed to be levied, at an election to be held specially for that purpose. The police jury or municipal corporation shall prescribe the manner of holding such election, and shall cause to be furnished to the commissioners a properly

[1] Laws 1873, ch. 142; 1 Dassler's Stats. § 204.

[2] R. S. 1870, §§ 2155–2158. The mayor of a city has no power to act. State of La. *v.* City of Shreveport, 27 La. Ann. 623.

certified list of the authorized voters: and such election shall be preceded by a notice for thirty days, published in one or more newspapers in the parish or municipal corporation where it shall be held. If the ordinance be rejected by a majority of the voters, it shall be lawful at any subsequent period, at intervals of not less than six months, again to take the sense of the voters in the same manner as at the first election.

The stock subscribed shall not belong to nor be administered by the parish or municipal corporation by which the subscription shall be made, but shall belong to the tax-payers, who shall have paid therefor; and the tax receipt of each tax-payer shall entitle him to a certificate, transferable by delivery, from the corporation to which subscription has been made, for an amount equal to the amount of his tax paid.

243. Maine. — The Constitution provides that the credit of the state shall not be directly or indirectly loaned in any case.[1] By statute [2] any city or town, by a two thirds vote, at any legal meeting called for the purpose, may raise by tax or loan, from time to time or all at once, a sum of money not exceeding in all five per cent. on its regular valuation for the time being, and appropriate it to aid in the construction of railroads in such manner as it may deem proper; and for such purpose may make contracts with any person or railroad corporation.

A city or town raising money by loan as aforesaid shall raise and pay, besides the interest, each year after the third, not less than three per cent. of the principal unless it is satisfactorily provided for in some other way. Meetings for the purposes aforesaid in cities shall be called by the municipal officers, on the order of the common council, as meetings for the election of city officers are called; and said common council shall set forth in their order the substance of the proposition to be inserted in the warrant. At such meetings, the legal voters shall vote in wards by ballot, those in favor of the proposition in the warrant voting "Yes," and those opposed voting "No;" the ballots cast shall be sorted, counted, and declared in open ward meeting, and recorded; and the clerks shall make returns thereof to the municipal officers, who shall examine such returns; and if two thirds of the ballots

[1] Amend. 1848, art. vi.

[2] Rev. Stat. 1871, ch. 51, §§ 80, 82, 83; Act 1867, ch. 119, §§ 1–4.

cast are in favor of the proposition, said officers shall forthwith proceed to carry the same into effect.[1]

244. Maryland.[2] — No county of this state shall contract any debt or obligation in the construction of any railroad, canal, or other work of internal improvement, nor give or loan its credit to or in aid of any association or corporation, unless authorized by an act of the general assembly, which shall be published for two months before the next election for members of the house of delegates in the newspapers published in such county, and shall also be approved by a majority of all the members elected to each house of the general assembly at its next session after such election.

245. Massachusetts.[3] — By statute any town and any city having, by the census of the year eighteen hundred and seventy, less than thirty thousand inhabitants, within which the road of any railroad corporation hereafter organized, or the roads of any existing railroad corporation not now constructed, shall be located or terminate, may subscribe for and hold shares of the capital stock or the securities of such railroad corporations, or either of them, to an amount not exceeding, for the aggregate in all such corporations, two per centum of the valuation of such town or city for the year in which the subscription is made; and towns having a valuation not exceeding three millions of dollars may subscribe for and hold the securities of such corporation, or either of them, to an amount not exceeding three per centum of the valuation of such town, in the year in which such subscription is made, in addition to the two per centum hereinbefore provided: provided, that two thirds of the legal voters, present and voting by ballot and using the check-list, at legal meetings called for the purpose in such town or city, and held in like manner as the meetings for the choice of municipal officers are now held by law in such town or city respectively, shall vote to subscribe for such shares or securities in such corporation.

Towns and cities subscribing for such stock or securities may

[1] On construction of this statute, see Portland & Ogdensburg R. R. Co. *v.* Standish, 65 Me. 63.

[2] Const. 1867, art. iii. § 54.

[3] Acts 1874, ch. 372, § 35. For previous laws, see Acts 1874, ch. 251; Acts 1870, ch. 325, § 3.

raise money to pay for the same by tax or loan, and may issue their notes or bonds for such loan.[1]

Any town or city owing debts incurred to obtain funds for one or more subscriptions for the capital stock and securities of any railroad corporation may, for the purpose of paying the same, establish a sinking fund,[2] and may contribute thereto any sums which it may receive from the sale of such stock or securities, or from any dividends or interest upon the same, or from taxes which it may vote to raise for the payment of such indebtedness. Any town or city owing such debts shall annually raise by taxation a sum sufficient to pay the interest on the same, or, if there is any income derived from the capital stock or securities owned by such town or city as aforesaid, a sum sufficient to pay the excess of such interest payable by said town or city over such income.

No town or city shall hereafter increase its indebtedness[3] for the purpose of subscribing to the stock or securities of railroad corporations, to an amount which, with the existing net indebtedness of such town or city incurred for any purpose, shall exceed the limit of three per centum of the valuation of the taxable property therein, to be ascertained by the last preceding town or city valuation for the assessment of taxes; but the limitation of this act shall not apply to temporary loans in anticipation of the taxes of the year in which such debts are incurred, and the year next ensuing, and expressly made payable therefrom by vote of the said town or city.

246. Michigan.[4] — The credit of the state shall not be granted to, or in aid of, any person, association, or corporation. The state shall not subscribe to, or be interested in, the stock of any company, association, or corporation. The state shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the state of lands or other property.

The Supreme Court of this state on May 26, 1870, rendered a decision that the legislature could confer no authority upon a municipal corporation to aid the construction of a railroad, and to raise money therefore by taxation.[5]

[1] Acts 1874, ch. 372, § 39.
[2] Acts 1876, ch. 133, §§ 1, 3.
[3] Acts 1876, ch. 175.
[4] Const. 1850, art. xiv. §§ 6, 8, 9.
[5] People *v.* Township Board of Salem, 20 Mich. 452; 4 Am. R. 400. Followed

By a statute enacted in 1875, counties, townships, cities, and villages, which had issued bonds in aid of the construction of any railroad prior to the 26th day of May, 1870, are authorized to provide for the payment of the principal and interest of the same by a tax to be collected from the taxable property of the corporation; and are also authorized to substitute new bonds for such as are outstanding.[1]

This latter statute was doubtless passed in consequence of the decision of the Supreme Court of the United States,[2] that the legislation of this state authorizing municipal corporations to aid in the construction of railroads was valid, and that the decisions of the Supreme Court of the state to the contrary are not to be respected, because not satisfactory in principle, and the subject matter of the decisions is not local, but belongs to the domain of general jurisprudence. "In this class of cases," said Swayne, J., delivering the judgment of the Supreme Court of the United States, "this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal."

247. Minnesota.[3] — The credit of the state shall never be given or loaned in aid of any individual association or corporation. The legislature shall not authorize any county, township, city, or other municipal corporation to issue bonds or to become indebted in any manner to aid in the construction or equipment of any or all railroads to any amount that shall exceed ten per centum of the value of the taxable property within such county, township, city, or other municipal corporation. The amount of such taxable prop-

in People *v.* State Treasurer, 23 Mich. 499; People *v.* State Treasurer, 24 Mich. 468; Thomas *v.* City of Port Huron, 27 Mich. 320. Graves, J. dissenting. See § 229.

[1] Laws 1875, p. 193.

[2] Township of Pine Grove *v.* Talcott, 19 Wall. 666 (1873).

[3] Const. 1857, art. ix. § 10; and see Amendments, 1858 and 1860.

erty is to be ascertained and determined by the last assessment of said property made for the purpose of state and county taxation previous to the incurring of such indebtedness.[1]

Authority to aid the construction of railroads has frequently been conferred upon cities and towns by special acts.[2]

248. Mississippi.[3] — The credit of the state shall not be pledged or loaned in aid of any person, association, or corporation; nor shall the state hereafter become a stockholder in any corporation or association. The legislature shall not authorize any county, city, or town, to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two thirds of the qualified voters of such county, city, or town, at a special election or regular election to be held therein, shall assent thereto.[4]

249. Missouri.[5] — No county, township, city, or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning, or other institution, whether created for or to be controlled by the state or others. All authority heretofore conferred for any of the purposes aforesaid by the general assembly, or by the charter of any corporation, is hereby repealed. The general assembly shall have no power to give or to lend, or to authorize the giving or lending of the credit of the state,[6] in aid of or to any person, association, or corporation, whether municipal or other, or to pledge the credit of the state in any manner whatsoever for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever. The general assembly shall have no power to make any grant, or to authorize the making of any grant, of public money or thing of value to any individual, association of

[1] Amendment to Const. adopted Nov. 5, 1872. This provision has reference only to future legislation. State *v.* Town of Clark, 23 Minn. 422.

[2] As for instance Spec. Laws 1869, chs. 34, 35, 44; Spec. Laws 1868, chs. 20, 24; Spec. Laws 1870, ch. 49.

[3] Const. 1868, art. xii. §§ 5, 14.

[4] As to construction of this requirement of a two thirds vote, see City of Vicksburg *v.* Lombard, 51 Miss. 111, 126.

[5] Const. 1875, art. ix. § 6.

[6] Const. 1875, art. iv. §§ 45, 46, 47, 49.

individuals, municipal or other corporation whatsoever. The general assembly shall have no power to authorize any county, city, town, or township, or other political corporation or subdivision of the state now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value, in aid of or to any individual, association, or corporation whatsoever, or to become a stockholder in such corporation, association, or company. The general assembly shall have no power hereafter to subscribe, or authorize the subscription of stock on behalf of the state, in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations by the state. The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already past.[1]

The former Constitution of Missouri[2] provided that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." This prohibition extended to townships which were not incorporated municipal bodies, although not named in the constitutional provision.[3]

A statute[4] authorizing such aid when sanctioned by "two thirds of the qualified voters of the township *voting at the election*" was at first regarded as in conflict with the Constitution,[5] but this decision was afterwards overruled;[6] and though the Supreme Court of Missouri afterwards held the act unconstitutional,[7] the federal courts disregarded the state decision.[8]

Under this Constitution the legislature could not authorize a county to issue its bonds to secure the establishment of a school of

[1] Const. 1875, art. xii. § 19.

[2] Of 1865, § 14, art. xi.

[3] Harshman *v.* Bates County, 92 U. S. 569; Jordan *v.* Cass County, 3 Dill. 185.

[4] Approved March 23, 1868.

[5] Harshman *v.* Bates County, *supra*. See § 269.

[6] County of Cass *v.* Johnston, 95 U. S. 360; County of Cass *v.* Jordan, 95 U. S. 373.

[7] State *v.* Brassfield, referred to in Foote *v.* Johnson County, *infra*.

[8] Westermann *v.* Cape Girardeau County, U. S. C. C. for Mo. 7 Cent. L. J. 353; Foote *v.* Johnson County, 6 Cent. L. J. 345.

mines within its limits, except in compliance with the requirement that the proposition be assented to by a vote of two thirds of the voters of the county.[1]

In conflict with this constitutional provision was also an act[2] authorizing certain municipalities to purchase lands and donate, lease, or sell the same to a railroad company as a means of inducing it to locate and build its machine-shops on the lands, and of assisting it to do so, and for this purpose to issue its bonds, to be paid by taxation, on the sanction of a majority vote. It is a "loan of credit" within the meaning of the Constitution for a municipality to purchase lands, pay the price in its bonds, and give the lands to a railroad company.[3] "If the bonds in suit," said Judge Dillon, "had been executed and delivered *directly* to the railroad company as the consideration for its agreement to locate its machine-shops within the town, then, on the only assumption on which the bonds can be sustained, viz., that such shops are part of the railroad, or necessary for its use, would not the execution and delivery of such bonds to the railway company be the loaning by the town of its credit to the company? It is not different in essence, and particularly in view of the object of the Constitution, viz., to prevent taxing the people without the required consent, that the town sells its own bonds and gives to the company the proceeds, instead of the bonds themselves. The bonds in question, if valid, create a debt against the defendant city for the benefit of a railroad corporation, and are thus within the mischief or evil which the Constitution aimed to remedy. Why, then, should not the constitutional provision be held applicable to these bonds? It cannot be maintained, on solid grounds, that the barrier of a two thirds vote, weak and ineffectual as it has proved to be, can be evaded by a mere change of the form of the aid, that is, by giving the aid in the shape of a *donation* of the proceeds of credit, instead of a subscription for stock, or, instead, giving the bonds directly to the company which the municipality desires to assist."

250. Nebraska.[4] — No city, county, town, precinct, municipality, or other subdivision of the state shall ever become a subscriber

[1] State *v.* Curators State University, 57 Mo. 178.

[2] Of March 18, 1870.

[3] Jarrott *v.* City of Moberly (U. S. C. C. W. D. Mo. April T. 1878), 5 Reporter, 583.

[4] Const. 1875, art. xi. Municipal Corporations.

to the capital stock, or owner of such stock, or any portion or interest therein, of any railroad or private corporation, or association. No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad or other works of internal improvement, unless a proposition to do so shall have been first submitted to the qualified electors thereof at an election by authority of law; provided, that such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent. of the assessed valuation of such county; provided, further, that any city or county may, by a two thirds vote, increase such indebtedness five per cent. in addition to such ten per cent., and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law.

The credit of the state shall never be given or loaned in aid of any individual association or corporation.[1]

At the time of the adoption of this constitutional provision there was a statute in force[2] enabling counties, cities, and precincts to issue bonds to aid works of internal improvement not exceeding ten per cent. of the assessed value of the taxable property, upon a two thirds vote in favor of such aid. This law not being in conflict with the Constitution continued in force after its adoption. The Constitution itself, of its own force, did not invest counties with any inherent power to grant aid independently of legislative authority, and, therefore, without such authority the limit of ten per cent. could not be extended by an additional five per cent. The Constitution was restrictive merely upon the legislative discretion; it fixed a boundary beyond which the legislature could not go. Within the boundary set the whole matter was left to legislative authority. A vote of a donation to the amount of fifteen per cent. of the taxable property, being a vote in excess of the statutory limit, was held void, and the issue of bonds under it enjoined.[3]

251. Nevada.[4] — The state shall not donate or loan money or

[1] Const. 1875, art. xii. §§ 2, 3.

[2] Acts of Feb. 15, 1869, as amended March 3, 1870, and Feb. 17, 1875; Gen. Stat. 448; Laws 1875, p. 87.

[3] Reineman *v.* Covington, Columbus & Black Hills R. R. Co. 7 Neb. 310.

[4] Const. 1864, art. viii. §§ 9, 10.

its credit, subscribe to or be interested in the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes. No county, city, town, or other municipal corporation, shall become a stockholder in any joint stock company, corporation, or association whatever, or loan its credit in aid of any such company, corporation, or association, except railroad corporations, companies, or associations.

252. New Hampshire. — In this state towns were at one time [1] authorized upon a two thirds vote to raise money by tax or loan to aid the construction of any railroad in the state to an amount not exceeding five per cent. of its valuation for that year. The act giving this authority was repealed in 1877 by a statute which provided that no town or city shall thereafter directly or indirectly loan or give its money or credit, in any form, for the benefit of any corporation having for its object a dividend of profits, nor in any way aid the same by taking the stock, bonds, or other obligations of such corporation.[2] This provision was made a part of the Constitution of the state by an amendment adopted the same year.[3]

254. New Jersey.[4] — The credit of the state shall not be directly or indirectly loaned in any case.

Municipal subscriptions have been authorized by the legislature in favor of particular roads.[5]

255. New York.[6] — Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. No county, city, town, or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation, or become directly or indirectly the owner of stock or of bonds of any association or corporation, nor shall any such county, city, town, or village be allowed to incur any indebtedness, except for county, city, town, or village purposes. This section shall

[1] Act 1864, p. 2890; G. S. 1867, ch. 34, §§ 16–20. This law declared constitutional. Perry *v.* Keene, 56 N. H. 514.

[2] July 19, 1877; Laws 1877, ch. 69.

[3] Amendment 1877; ratified March 13.

[4] Const. 1876, art. iv. § 6, pl. 3.

[5] As for instance in favor of the Passaic Valley & Peapack R. R. Co. Act April 9, 1868; Lane *v.* Schomp, 20 N. J. Eq. 82.

[6] Const. Amendment 1874, art. viii. § 10, went into effect Jan. 1, 1875.

not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law.[1]

This amendment was adopted in view of the disastrous consequences of legislation inaugurated in 1869,[2] whereby towns and other municipal corporation swere authorized to loan their credit in various ways to aid in the construction of railroads. This authority was obtained by a petition of a majority of the taxpayers of the town or corporation, representing a majority of the taxable property, to the county judge, who was authorized to determine whether such majority had petitioned, and to appoint commissioners to issue bonds not exceeding twenty per cent. of the taxable property of the corporation.

On the first day of January, 1875, when the amendment went into effect, all action on the part of any town to issue its bonds in aid of a railroad not then completed at once became nugatory, unless by operation of law, or by some valid agreement, there had been created prior to that time a right to have such action perfected by the issuing of bonds.[3]

256. North Carolina.[4] — No county, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.

It is provided by statute[5] that the county commissioners of the several counties in this state shall have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

The commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the commissioners shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company,

[1] Const. Amendment 1874, art. viii. § 11.

[2] Laws 1869, ch. 907; 1870, chs. 173, 507, 789; 1871, chs. 64, 146, 260, 283, 388, 925; 1872, ch. 883.

[3] Falconer *v.* Buffalo & Jamestown R. R. Co. 69 N. Y. 491.

[4] Const. 1868, art. vii. § 7; Const. 1876, art. vii. sec. 7.

[5] Revisal 1873, ch. 99, §§ 66, 67, 69; Act 1868–9, ch. 171, § 1.

and whether in bonds, money, or other property, and thereupon the commissioners shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them, and submitted to the people, subject to all the rules, regulations, and restrictions of other stockholders in such company or companies.

In case the county shall subscribe the amount proposed in bonds, the commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and also to fix the time and places of paying the interest, and to determine the mode and manner of the same; and also shall have power to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

The commissioners are authorized to make the subscription, if a majority of the votes cast at the election be in favor of such subscription, although a majority of all the voters of the town did not vote.[1]

257. Ohio.[2] — The credit of the state shall not in any manner be given or loaned to, or in aid of, any individual, association, or corporation whatever; nor shall the state ever hereafter become a joint-owner or stockholder in any company or association in this state or elsewhere, formed for any purpose whatever. The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association.

A statute which attempts to do indirectly what is thus prohibited, as for instance to authorize municipalities to raise money for building so much of a railroad as can be built for the amount raised, is in contravention of these provisions of the Constitution;[3]

[1] Reiger *v.* Commissioners of the Town of Beaufort, 70 N. C. 319.

[2] Const. 1851, art. viii. §§ 4, 6.

[3] Taylor *v.* Commissioners of Ross County, 23 Ohio St. 22, in relation to Act of April 23, 1872.

though a statute authorizing a city to build an entire railroad as a public work was sustained.[1]

It was competent for the legislature, under the Constitution of 1802, to construct works of internal improvement on behalf of the state, or to aid in their construction by subscribing to the capital stock of corporations created for that purpose, and to levy taxes to raise the means, and by an exercise of the same power to authorize a county or township to subscribe to a work of that character, running through or into such county or township, and to levy a tax to pay the subscription.[2]

258. Oregon.[3] — The state shall not subscribe to, or be interested in, the stock of any company, association, or corporation. No county, city, town, or other municipal corporation, by vote of its citizens or otherwise, shall become a stockholder in any joint stock company, corporation, or association whatever, or raise money for, or loan its credit to, or in aid of any such company, corporation, or association.

259. Pennsylvania.[4] — The credit of the commonwealth shall not be pledged or loaned to any individual, company, corporation, or association, nor shall the commonwealth become a joint-owner or stockholder in any company, association, or corporation. The general assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual.

It had been decided in 1839 that municipal corporations could not, without special legislation for the purpose, levy a tax in aid of railroad companies.[5] Subsequently several statutes were passed legalizing and authorizing the granting of such aid,[6] the consequences of which were so disastrous that the above constitutional provision was adopted.[7]

[1] Walker *v.* City of Cincinnati, 21 Ohio St. 14.

[2] Cincinnati, Wilmington & Zanesville R. R. Co. *v.* Clinton County, 1 Ohio St. 77; State *v.* Trustees of Union Township, 8 Ohio St. 394, 398.

[3] Const. 1857, art. xi. §§ 6, 9.

[4] Const. 1873, art. ix. §§ 6, 7. Originally adopted 1857.

[5] M'Dermond *v.* Kennedy, Bright. (Pa.) 332.

[6] See Act 27 March, 1818; Act 15 May, 1850.

[7] Pennsylvania R. R. Co. *v.* City of Phila. 47 Pa. St. 189.

260. Rhode Island.[1] — The Constitution provides that without the express consent of the people the legislature shall not in any case pledge the faith of the state for the payment of the obligations of others.

261. Tennessee.[2] — The credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority.[3]

The credit of the state shall not be hereafter loaned or given to or in aid of any person, association, company, corporation, or municipality, nor shall the state become a stockholder with others in any association, company, corporation, or municipality.

262. Texas. — The legislature shall have no power to authorize any county, city, town, or other political corporation, or subdivision of the state, to lend its credit or to grant public money or thing of value, in aid of or to any individual, association, or corporation whatsoever; or to become a stockholder in such corporation, association, or company.[4] No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.[5]

Statutes authorizing municipal aid under the former Constitution were valid.[6]

263. Vermont.[7] — By statute any town or city in this state

[1] Const. 1842, art. iv. § 13.

[2] Const. 1870, art. ii. §§ 29, 31.

[3] Certain counties are excepted from the operation of this provision, so far that the assent of a majority of the qualified voters of either of said counties voting on the question shall be sufficient, when the credit of such county is given or loaned to any person, association, or corporation, provided that this exception shall not be enforced beyond the year 1880.

[4] Const. 1876, art. iii. § 52.

[5] Const. 1876, art. xi. § 3.

[6] Harcourt *v.* Good, 39 Tex. 455.

[7] Laws 1872, p. 75, §§ 1, 2, 4; Laws 1874, p. 45, § 5.

may aid in the construction of any railroad organized under the provisions of the general railroad law, by issuing bonds to aid such railroad, by taking capital stock therein, or in such other manner as such town or city shall direct; provided, that no town or city shall assume liability for any such road exceeding eight times the grand list of such town or city at the time such aid is granted.

Such aid shall be given in the following manner. The selectmen of any town, and the mayor of any city, on the application of ten or more legal voters of said town or city, shall, within ten days after the receipt of said application, warn a meeting of legal voters of such town or city to be held at the usual places of holding town or city meetings in said town or city, which notice shall specify the time and place of the meeting, which shall not be more than twenty nor less than twelve days from the time of posting such notice; and the warning shall be sufficient if it states the business to be done at said meeting is to aid in the construction of the railroad so organized, the name of which railroad shall be stated in such warning; and if a majority of the votes given at said meeting shall be to aid said road, then the town or city shall fix the amount of aid to be given, and the terms thereof, and may appoint three commissioners, who shall be resident tax-payers of the town or city, and if no commissioners be appointed, the selectmen of such town and aldermen of such city shall act as commissioners until commissioners shall be appointed by said town or city. Said commissioners, selectmen, or aldermen shall be duly sworn, and shall as soon as may be prepare suitable books in which said votes shall be set forth, in which the tax-payers of said town or city may sign their names, assenting to said vote, and the grand list of each person signing said assent shall be annexed to his name; and when a majority of the tax-payers of said town or city, both in number and amount of grand list, shall have signed the same, the same shall be binding on the town or city: provided, the signatures are procured within one year after the first signature to the paper is made; and all persons and corporations liable to pay taxes, and all persons who shall be owners of real estate taxed at the time the assent is given, shall have a right to assent to said vote.

Such town or city may issue bonds, with coupons payable semi-annually, at any rate of interest not exceeding seven per cent., for

the purpose of aiding such road. The commissioners, selectmen, or aldermen aforesaid, as soon as the assent is given and recorded as aforesaid, shall proceed to carry into effect the vote of said town or city, according to the terms and conditions thereof, and shall have power to vote and act for said town or city on all proper occasions to carry into effect the vote aforesaid, and their votes and acts shall be binding on said town or city.

264. Virginia.[1] — The credit of the state shall not be granted to, or in aid of, any person, association, or corporation. The state shall not subscribe to, or become interested in, the stock of any company, association, or corporation. The state shall not be a party to, or become interested in, any work of internal improvement, nor engage in carrying on any such work, otherwise than in the expenditure of grants to the state of land or other property.

By statute,[2] the county court of any county, or the common council, or board of trustees, of any city or town, or township board of any township, in this commonwealth, may make an order requiring the sheriff or sergeant, and commissioners of election, at the next general election for state, city, town, or county, or township officers, or at any other time, not less than thirty days from the date of said order, which shall be designated therein, to open a poll and take the sense of the qualified voters on the question, whether the board of supervisors, council, or board of trustees, or township board, shall subscribe to the stock of any internal improvement company, named in the order, which has been incorporated by the general assembly. The said order shall state the maximum amount proposed to be subscribed, which shall in no case exceed one fifth of the total capital stock of said company, or an amount, the interest upon which, at the rate authorized by the council or board of trustees of any city or town, or board of supervisors of any county, or township board of any township, shall not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars ; provided, that the bonds issued by any county, city, or town, or township, subscribed

[1] Const. 1870, art. x. §§ 12, 14, 15.

[2] Code 1873, ch. 61, § 62. By statute of March 25, 1875, it is provided that whenever the counties of Fairfax, Loudoun, Clark, or Frederick, or any city or town within these counties, shall issue bonds in payment of subscriptions to the stock of any company, they shall levy and collect a tax for a sinking fund, sufficient, in connection with the dividends received from the stock, to redeem the bonds at maturity. Acts 1874–5, p. 261.

to any internal improvement company, shall be received by such company at their par value.

265. West Virginia.[1] — The credit of the state shall not be granted to or in aid of any county, city, township, corporation, or person; nor shall the state ever assume or become responsible for the debts or liabilities of any county, city, town, township, corporation, or person; nor shall the state ever hereafter become a joint-owner or stockholder in any company or association in this state or elsewhere, formed for any purpose whatever.

It is provided by statute[2] that it shall be lawful for the county court, or other court or tribunal established in lieu of a county court, or the council or board of trustees of any county, city, or town through, by, or near to which the railroad company shall have been incorporated to construct a railroad and branches, and likely to be benefited thereby, to make an order requiring the sheriff or sergeant, and commissioners of election, at a time to be designated in such order, not less than one month from the date thereof, to open polls and take the sense of the legal voters of such county or district thereof, city, or town, on the question whether such county or district thereof, city, or town, shall subscribe to the stock of said company incorporated to construct a railroad through, by, or near such county, district, city, or town, and by the construction of which such county, city, or town is likely to be benefited. The said order shall state the amount proposed to be subscribed, and in case such order be made by the county court, or other court or tribunal established in lieu of a county court of any such county, or the council or board of trustees of any such city or town, the legal voters residing in any district of a county, city, or town located in any such counties, as the case may be, shall be entitled to vote upon the question. If it shall appear that three fifths of the votes cast at such election are in favor of the subscription, such commissioners of elections at the court-house, or council, or board of trustees, shall forthwith so declare, and when so declared, it shall be the duty of the county court, or other court or tribunal established in lieu of a county court of the county, at the first meeting thereafter, or the members of the

[1] Const. 1872, art. x. § 6.

[2] Acts 1873, ch. 88, §§ 27, 28. See prior act authorizing county subscriptions to works of internal improvement; Acts 1863, p. 70, § 9; Code 1870, ch. 39, § 40.

council or board of trustees of any city or town, to meet on the fifth day thereafter (Sunday excepted), to carry out the wishes of said voters. The said subscription shall be paid in cash, or in the coupon bonds of said county, district, city, or town, at par; the said bonds to be redeemed within thirty-four years, as such county court, or other tribunal established in lieu of a county court, councilmen, or trustee of any city or town may elect, and shall bear interest, and the matured coupons shall be received by the authorities of such county, city, or town, at par, in payment of all taxes, fines, and other like obligations: provided, that no county, district, city, or town within this state shall hereafter be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness; nor without at the same time providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within and not exceeding thirty-four years. But no debt shall be contracted under these provisions, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three fifths of all the votes cast for and against the same.

266. Wisconsin.—The Supreme Court of the state has held that municipal corporations have no power under legislative sanction to make donations of money, in aid of a railroad and to levy a tax to pay for the same;[1] but that they are liable upon bonds issued in payment of subscriptions to the capital stock of a railroad company.[2] The Constitution of the state makes it the duty of the legislature, in providing for the organization of cities and incorporated villages, to restrict their power of loaning their credit, so as to prevent abuses; and consequently recognizes their power, under some circumstances and for some purposes, to loan their credit.[3] But the various statutes on the subject, taken together, clearly establish a public policy to encourage municipalities to aid

[1] Whiting *v.* Sheboygan & Fond du Lac R. R. Co. 25 Wis. 167.

[2] Phillips *v.* Town of Albany, 28 Wis. 340; Supervisors of County of Portage *v.* Wisconsin Cent. R. R. Co. 121 Mass. 460.

[3] Rogan *v.* City of Watertown, 30 Wis. 259.

in the construction of railroads.[1] The right to subscribe stock in aid of railroad companies has frequently been conferred upon counties and towns in favor of particular railroad companies.[2]

The present general statute authorizing municipal corporations to aid in the construction of railroads is that enacted in 1872 as amended in several subsequent statutes.[3] Any county, town, incorporated city, or incorporated village is authorized to grant such aid by subscribing to the stock of any railroad company which will promote the general prosperity and welfare of its tax-payers. The corporation and the railroad company may agree upon the terms upon which such aid shall be granted. Prior to the amendment of 1875,[4] the municipality was authorized to issue bonds to the railroad company to an amount not exceeding, with its existing indebtedness, ten per centum of its valuation; but by that amendment it was enacted that the agreement of the parties should provide that the aid should consist in a tax, not exceeding in amount five per centum of the taxable property. In case such agreement is made an election is held, and if a majority of the legal voters who vote at such election shall vote for the railroad proposition, a tax to the amount of aid so voted shall be entered upon the next assessment roll, and collected and paid over to the company. The company is empowered to purchase at any tax sale had for the collection of such tax; it being the intent of the act that the company shall be entitled to the proceeds of such tax voted and assessed, whether in money collected or certificates of sale, to the amount of the bid so voted.

III. *Conditions precedent to granting Municipal Aid.*

267. Effect of non-compliance with conditions respecting the issue of bonds. —When special authority is conferred upon a municipal corporation to aid a private company by the issue of its bonds, the legislature may properly direct the mode in which

[1] Town of Platteville *v.* Galena & Southern Wis. R. R. Co. 43 Wis. 493, 503.

[2] See for instance statutes of March 9, 1869; March 1, 1871.

[3] Laws 1872, ch. 182, amended; Laws 1873, chs. 277, 289; Laws 1874, ch. 317; Laws 1876, vol. i. ch. 128. These statutes provide at length for the making of the agreement and the holding of the election. See Bound *v.* Wisconsin Cent. R. R. Co. Sup. Ct. of Wis., 1878, 6 Reporter, 704.

[4] Laws 1875, ch. 168. Aid may be given to extend road or to build branches. Laws 1876, vol. i. ch. 66; or in aid of narrow-gauge railroads. Laws 1876, vol. i. ch. 29.

this power shall be exercised, and may constitute such agents as it may choose to carry out the power so granted, although such agents be not officers of the municipality or persons chosen by it.[1] Although irregularity, or even fraud, in the issue of such bonds will not invalidate the bonds in the hands of a *bonâ fide* holder, but only in the hands of those who have notice of the irregularity or fraud, yet upon a proper application the issue of the bonds may be enjoined, when the statute authorizing their issue has not been complied with in matters of substance. Thus an injunction was issued to restrain the issue of bonds authorized by a statute of the State of Nebraska, which required the bonds to be paid in ten years, whereas a county had voted to issue the bonds to run twenty years.[2]

But a statutory provision that bonds shall not run more than thirty years from the date thereof is directory, and not of the essence of the power to issue. Bonds dated September 10, payable thirty years from October 15 in the same year, are of the same legal effect as if they had been dated of the latter date, and are not invalid as contravening the statute.[3]

Under a statute authorizing municipal subscriptions and bonds in aid of railroads upon conditions, and providing that these "shall not be valid and binding until such conditions precedent have been complied with," it is not essential to the validity of the subscription or of the bonds that the conditions annexed shall have been first performed, if they are performed after the making of the subscription or even after the issue of the bonds.[4]

268. The validity of the subscription in aid of the railroad as between the immediate parties depends upon the result and validity of the election held to authorize the subscription. A Court of Chancery, upon a bill filed by a tax-payer, may investigate a vote of a municipal corporation to issue bonds in aid of a railroad. Under a statute authorizing such issue upon the vote of a majority of the legal voters, the contract of subscription is not binding in favor of the railroad company except as authorized

[1] Sheboygan County *v.* Parker, 3 Wall. 93.

[2] Union Pacific R. R. Co. *v.* Lincoln County, 3 Dill. 300; and see Union Pacific R. R. Co. *v.* Merrick County, 3 Dill. 359; Cairo & St. Louis R. R. Co. *v.* City of Sparta, 77 Ill. 505.

[3] Township of Rock Creek *v.* Strong, 96 U. S. 271.

[4] Town of Eagle *v.* Kohn, 84 Ill. 292.

by law, and entered into in pursuance of all the essential requirements of the statute.[1] If, upon inquiry, the subscription proves not to have been duly authorized, the court may enjoin the issuing of the bonds;[2] or if the bonds have already been issued, it may declare them void, and order their cancellation so far as the railroad is concerned, though the title of *bonâ fide* purchasers of the bonds for value may not be affected.[3]

Formalities imposed by the legislature upon municipal corporations as conditions precedent to the exercise of a power of borrowing which rests wholly upon legislative authority are regarded as imperative as between the immediate parties.[4] Such for instance is a requirement that the assent of the voters of a town or county to the issuing of bonds in aid of a railroad or other private corporation shall first be obtained.[5] Bonds issued without such assent have been held in exceptional cases void, even in the hands of *bonâ fide* holders.[6] In like manner a condition imposed by the vote of a township in favor of a subscription in aid of a railroad, that the bonds shall be issued only when work equal in value to the amount of the bonds shall be done in the township, is imperative, and is not fulfilled by doing work elsewhere, even with the consent of the officers of the township. Moreover, a condition once imposed by a vote cannot be changed by a subsequent election unless the first election was void. The power conferred upon the township to vote such aid is exhausted when once acted upon, unless authority be given it by statute to act again.[7]

269. Meaning of two thirds of qualified voters. — A provision of the former Constitution of Missouri that "the general

[1] Chambers County *v.* Clews, 21 Wall. 317, 321; Winston *v.* Tenn. & Pacific R. R. Co. 57 Tenn. 60; 15 Am. Railw. R. 237; Louisville & Nashville R. R. Co. *v.* County Court of Davidson, 1 Sneed (Tenn.), 637, 640.

[2] Cases in preceding note, and Union Pacific R. R. Co. *v.* Lincoln County, 3 Dill. 300; Same *v.* Merrick, Ib. 359; Portland & Oxford Central R. R. Co. *v.* Hartford, 58 Me. 23; Packard *v.* Jefferson County, 2 Colo. 338.

[3] Belo *v.* Com'rs of Forsythe County, 76 N. C. 489; Chester & Lenoir R. R. Co. *v.* Caldwell County, 72 N. C. 486.

[4] Essex County R. R. Co. *v.* Town of Lunenburgh, 49 Vt. 143; McCoy *v.* Briant, 11 Chicago Leg. N. 84.

[5] Leavenworth & Des Moines R. R. Co. *v.* County Court of Platte County, 42 Mo. 171.

[6] City *v.* Lamson, 9 Wall. 477; Steines *v.* Franklin County, 48 Mo. 167; 8 Am. R. 87.

[7] Illinois Midland R. R. Co. *v.* Waynesville, Sup. Ct. of Ill. 6 Reporter, 457; State *v.* County Court of Daviess County, 64 Mo. 30.

assembly shall not authorize any county, city, or town, to become a stockholder in, or to loan its credit to, any county, association, or corporation, unless two thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall *assent* thereto," was construed to authorize a law allowing such subscription when it appears "that not less than two thirds of the qualified voters of the township *voting at such election* are in favor of such subscription." All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect be clearly expressed.[1] Although the Supreme Court of the state subsequently pronounced this act unconstitutional,[2] the federal courts declined to follow that decision, on the ground that they are not bound by decisions of local courts invalidating negotiable commercial securities negotiated before there was any decision invalidating them.[3]

270. Generally the effect of a popular vote, had in pursuance of legislative authority to issue bonds in aid of a railroad company, is simply to empower its proper agents to act in the matter, and to bind the municipality by a formal subscription.[4] The vote alone does not generally constitute a subscription, or a contract to subscribe, or preclude the repeal of the authority to subscribe.[5]

[1] County of Cass *v.* Johnston, 95 U. S. 360, overruling Harshman *v.* Bates County, 92 U. S. 569, so far as in conflict. See, also, State *v.* Renick, Mayor of City of St. Joseph, 37 Mo. 270; State *v.* Binder, 38 Mo. 450; St. Joseph Township *v.* Rogers, 16 Wall. 644; Louisville & Nashville R. R. Co. *v.* County Court of Davidson, 1 Sneed (Tenn.), 638; People *v.* Wiant, 48 Ill. 263; People *v.* Garner, 47 Ill. 246; Taylor *v.* Taylor, 10 Minn. 107; Melvin *v.* Lisenby, 5 Cent. L. J. 15. See § 249.

[2] State *v.* Brassfield, referred to in Foote *v.* Johnson County, *infra*.

[3] Foote *v.* Johnson County, 6 Cent. L. J. 345; Westermann *v.* Cape Girardeau County, U. S. C. C. for Mo. 7 Cent. L. J. 353. See articles on Township Bonds of Missouri, and the decisions of the U. S. Supreme Court, 5 Cent. L. J. 499, 518.

[4] People *v.* Batchellor, 53 N. Y. 128; Town of Duanesburgh *v.* Jenkins, 57 Ib. 177, 192; People *v.* County of Tazewell, 22 Ill. 147; Union Pacific Ry. Co. *v.* Com. of Davis County, 6 Kans. 256; Crawford County *v.* Louisville, New Albany & St. Louis Air Line Ry. Co. 39 Ind. 192.

[5] Aspinwall *v.* County of Daviess, 22 How. 364; Harshman *v.* Bates County, 3 Dill. 150; affirmed, 92 U. S. 569; Union Pacific Ry. Co. *v.* Davis County, 6 Kans. 256.

271. **But an actual subscription on the books of the company, or one made in any formal manner, is unnecessary** when the law authorizing the subscription provides that the vote of the municipality in favor of a subscription shall be deemed to be a taking of the stock of the company. The statute in such case makes the vote an equivalent to a subscription, and a substitute for it.[1] Even without any such statute, a resolution of a board of supervisors having authority to make a subscription, ordering a subscription to be made, when recorded and afterwards acted upon is a binding contract of subscription. The resolution to subscribe is an immediate subscription.[2] In like manner, an order of a county court subscribing on behalf of the county for stock of a turnpike company, was regarded not as a mere pledge or offer to subscribe, but an actual taking or subscribing for the stock.[3]

272. **A municipal subscription in favor of a railroad company may be released by a subsequent alteration of the organization** or purposes of the company, if the alteration be a fundamental one, not contemplated either by the charter of the company or by the general statutes of the state.[4] But if a subscription be made to a company which is at the time authorized to consolidate with other companies, and accordingly a consolidation is afterwards effected with a company having a connecting line, a delivery of the bonds to the new company in payment of the original subscription is warranted, or may be compelled.[5]

But where the power to make a subscription depended upon a precedent vote which was made in favor of a certain corporation,

[1] Town of East Lincoln *v.* Davenport, 94 U. S. 801; Nugent *v.* Supervisors of Putnam County, 19 Wall. 241; County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631; Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625.

[2] County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631; Western Saving Fund Soc. of Phila. *v.* City of Philadelphia, 31 Pa. St. 175; City of Sacramento *v.* Kirk, 7 Cal. 419.

[3] Justices of Clarke County Court *v.* Paris, Winchester & Kentucky River Turnpike Co. 11 B. Mon. (Ky.) 143. See, however, Wilson *v.* Garrontte, Sup. Ct. Mo. April T. 1878, 7 Cent. L. J. 29.

[4] County of Bates *v.* Winters, U. S. Sup. Ct. 1878, 17 Albany L. J. 291.

[5] Town of East Lincoln *v.* Davenport, 94 U. S. 801; Nugent *v.* Supervisors of Putnam County, 19 Wall. 241; County of Callaway *v.* Foster, 93 U. S. 567; County of Scotland *v.* Thomas, 94 U. S. 682; *S. C.* 3 Dill. 7; County of Henry *v.* Nicolay, 95 U. S. 619; Philadelphia & Wilmington R. R. Co. *v.* Maryland, 10 How. 376; Tomlinson *v.* Branch, 15 Wall. 460; City of Mount Vernon *v.* Hovey, 52 Ind. 563; State *v.* Greene County, 54 Mo. 540; Lewis *v.* City of Clarendon, U. S. C. C. April T. 1878, 6 Reporter, 609.

and under a general law of the state this company was soon afterwards consolidated with another company, and the subscription by the county court was made in favor of the consolidated company without any new election, it was held that the subscription was unauthorized, and the bonds issued in payment of it void, even in the hands of a *bonâ fide* holder.[1] The authority given to the county court by the electors to make the subscription was regarded as revoked when the company in whose favor the vote was had ceased to exist, by being absorbed in another company by consolidation. The county court was regarded as the mere agent of the township, having no discretion to act beyond the precise terms of the power given. The authority to make the subscription ceased with the extinction of the company in whose favor the vote was had.

In the case of *Nugent* v. *Supervisors*[2] the subscription was made before the consolidation, whereas in the foregoing case there was only a bare vote before the consolidation, and the subscription was made in favor of the consolidated company.

Moreover, the authority given a county to subscribe for the stock of a railroad company, and the subscription when made, passes as a right and privilege of the company to a new company formed by the consolidation of the company to which the subscription was made with another.[3] A subscription made to a specified company, which has at the time power to consolidate with another company, may well be regarded as made in full view of the fact that the consolidation may occur without invalidating the subscription. If a prior vote be required to authorize the subscription, a vote in favor of one constituent company then having the power to unite with another company may well be regarded as authorizing a subscription in favor of the consolidated company.[4] At any rate, where a county court, or certain officers of a munic-

[1] Harshman *v.* Bates County, 92 U. S. 569; 3 Dill. 150. Such existing legislative authority to change the organization of the company distinguishes this case from Marsh *v.* Fulton County, 10 Wall. 676. See, also, Wilson *v.* Garroutte, Sup. Ct. Mo. April T. 1878, 7 Cent. L. J. 29.

[2] 19 Wall. 241.

[3] County of Scotland *v.* Thomas, 94 U. S. 682; 3 Dill. 7; Branch *v.* City of Charleston, 92 U. S. 677; Tomlinson *v.* Branch, 15 Wall. 460; Philadelphia & Wilmington R. R. Co. *v.* Maryland, 10 How. 376; Smith *v.* County of Clark, 54 Mo. 58; Hannibal & St. Jo. R. R. Co. *v.* Marion County, 36 Mo. 294; State *v.* Sullivan County, 57 Mo. 522; State *v.* Greene County, 54 Mo. 540; Hanna *v.* Cincinnati & Fort Wayne R. R. Co. 20 Ind. 30.

[4] Washburn *v.* Cass County, 3 Dill. 251. And see First Nat. Bank of St. Johnsbury *v.* Town of Concord, 50 Vt. 257.

ipality, have the power to subscribe for the stock of a particular company without a vote of the people, inasmuch as the authority to issue the bonds is complete without a subscription, the bonds may be delivered to a company formed by the consolidation of the specified company with another.[1]

273. The prior location of a railroad may be or may not be a condition precedent to submitting the question of a subscription in aid of it to a vote of the electors of a municipality.[2] This depends upon the terms of the statute. When a previous location is not required, it is not necessary to insert the name of the company to be aided in the proposition submitted to the popular vote, but it is sufficient to describe the contemplated route in general terms.[3] In like manner, whether the prior incorporation of the railroad company to which aid is subscribed is requisite to the validity of the subscription, and to the bonds issued in payment of the subscription, and not held by *bonâ fide* purchasers without notice, may depend upon the terms of the statute.[4] Under a statute of the State of Missouri, the Supreme Court of that state held that township subscriptions could not be used to bring the company into existence.[5] It is also competent for a municipal corporation to make its subscription upon condition that the road shall be completed within a certain time, or upon such other condition as may be considered necessary or desirable to insure the corporation against loss, and as between the parties such condition will be enforced.[6] A railroad company does not forfeit its right to aid granted on condition of constructing a certain number of miles of road by the fact that it purchases and adopts as a part of its line a section of a railroad already constructed on a portion of the

[1] Thomas *v.* County of Scotland, 3 Dillon, 7.

[2] Commissioners of Johnson County *v.* Thayer, 94 U. S. 631; County of Cass *v.* Jordan, 95 U. S. 373; *in re* Stratford & Huron Ry. Co. 38 Q. B. Upper Canada, 112.

[3] Commissioners of Johnson County *v.* Thayer, *supra*; County of Callaway *v.* Foster, 93 U. S. 567. The cases of Lewis *v.* Commissioners of Bourbon County, 12 Kans. 186; Mo. River, Ft. Scott & Gulf R. R. Co. *v.* Miami County, 12 Kans. 234, are not authorities on this point.

[4] County of Cass *v.* Johnston, 95 U. S. 360.

[5] Rubey *v.* Shain, 54 Mo. 207.

[6] Falconer *v.* Buffalo & Jamestown R. R. Co. 69 N. Y. 491; Portland & Oxford Cent. R. R. Co. *v.* Hartford, 58 Me. 23; Packard *v.* Jefferson County, 2 Colo. 338; California Northern R. R. Co. *v.* Butte County, 18 Cal. 671; Hodgman *v.* Chicago & St. Paul Ry. Co. 20 Minn. 48; 23 Ib. 153.

route on which the proposed railroad was to be built.[1] Assurances in writing by the officers of a railway company, that if a town would vote in favor of a subscription to its capital stock the company would not call for the bonds until satisfactory assurance should be given of the completion of the road, cannot be regarded as a fraud operating to induce an affirmative vote.[2] When it appears that the stipulation as to the time within which the road should be completed was not of the essence of the contract, and the benefits sought to be derived from the road have actually been received by the municipality subscribing, it will not be released from paying the subscription.[3]

There may also be a condition that the road shall be built in a certain place; and a breach of this would forfeit the right of the company to demand the aid granted upon such condition;[4] but after the bonds have been issued and sold in the market, no objection to the validity of the bonds can be sustained on the ground of a breach of such condition.[5] Damages may, however, be recovered by the municipality for a breach of such condition.[6]

After a municipality has subscribed for the stock of a railroad company, and issued its bonds in aid of its proposed main line, it may restrain the company from wasting its means in constructing branch roads when such use of its funds might result in disabling it from building its main line.[7]

A divergence in part from the proposed line of road may be authorized by a municipality after it has voted to grant aid.[8]

274. A charter of a corporation authorizing a municipal subscription, being a contract between the state granting it and the company receiving it, rights and privileges conferred by the charter, cannot be taken away without the company's consent, either by legislation or by constitutional provision. Thus a

[1] Stockton & Visalia R. R. Co. *v.* City of Stockton, 51 Cal. 328.

[2] Hensley Township *v.* People, 84 Ill. 544.

[3] Kansas City & Council Bluffs R. R. Co. *v.* Alderman, 47 Mo. 349. See, also, Supervisors of County of Portage *v.* Wisconsin Cent. R. R. Co. 121 Mass. 460.

[4] Virginia & Truckee R. R. Co. *v.* Lyons County, 6 Nev. 68, 71; State *v.* County Court of Daviess County, 64 Mo. 30; and see Stockton & Visalia R. R. Co *v.* City of Stockton, 51 Cal. 328. See Supervisors of County of Portage *v.* Wisconsin Cent. R. R. Co. 121 Mass. 460.

[5] Munson *v.* Town of Lyons, 539.

[6] Missouri, Kansas & Texas Ry. Co. *v.* City of Fort Scott, 15 Kans. 435.

[7] Town of Platteville *v.* Galena & Southern Wis. R. R. Co. 43 Wis. 493.

[8] Coleman *v.* Board of Supervisors, 50 Cal. 493.

charter of a railroad company, conferring upon it the right to receive subscriptions to its stock from any county in which any part of its route might be, without a vote of the county in favor of it, is held not to be affected by a subsequent constitutional provision prohibiting subscriptions to the stock of any corporation by counties, cities, or towns, unless two thirds of the qualified voters thereof shall assent thereto. A subscription authorized by the charter may be made after the adoption of such a constitutional provision, and the bonds issued in pursuance of it will be valid. The provision is construed to be prospective, and not retroactive, with respect to legislative grants of authority.[1]

A subscription to the stock of one railroad company may be transferred to another company, with the assent of the county or municipality making the subscription, and such subscription thereupon becomes a vested right which a subsequent change in the Constitution of the state will not defeat or impair.[2]

A statute authorizing a municipal corporation to loan its credit to a railroad company specified, and to "any other company duly incorporated and organized for the purpose of constructing railroads," leading in the same direction, authorizes aid to a company afterwards incorporated and organized.[3]

275. But the power to subscribe may be annulled by constitutional provision, or by statute, at any time before the subscription or the right to subscribe has become a vested right of the parties.[4] By a statute of the State of Illinois, enacted in 1867, towns were authorized to make appropriations or donations in aid of the construction of a railroad, to be paid as soon as its tracks should have been located and constructed through such town.

[1] County of Ray *v.* Vansycle, 96 U. S. 675; County of Henry *v.* Nicolay, 95 U. S. 619; County of Scotland *v.* Thomas, 94 U. S. 688; County of Callaway *v.* Foster, 93 U. S. 567; 3 Dill. 200; Nicolay *v.* St. Clair County, 3 Dill 163; Kansas City, &c. R. R. Co. *v.* Alderman, 47 Mo. 349; State *v.* Macon County Court, 41 Mo. 453; Smith *v.* County of Clark, 54 Mo. 58; State *v.* County Court of Sullivan County, 51 Mo. 522; Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Huidekoper *v.* Dallas County, 8 Dill. 171; State *v.* Greene County, 54 Mo. 540. See, also, State *v.* Saline County, 51 Mo. 350. Not in harmony with the foregoing: Jeffries *v.* Lawrence, 42 Iowa 498; Wilson *v.* Garrouttle, 7 Cent. L. J. 29.

[2] County of Ray *v.* Vansycle, 96 U. S. 675. See, however, Wilson *v.* Garrouttle, Sup. Ct. Mo. April T. 1878; 7 Cent. L. J. 29.

[3] James *v.* Milwaukee, 16 Wall 159.

[4] Falconer *v.* Buffalo & Jamestown R. R. Co. 69 N. Y. 491; 7 Hun, 499.

The town of Concord, in 1869, voted to make an appropriation for that purpose, provided the railroad company would run its road through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation; and in the year following its bonds, representing the donation, were issued. The Constitution of Illinois, which took effect July 2, 1870, provided that no municipality should become a subscriber to the capital stock of any railroad, or make a donation to, or loan its credit in aid of, such corporation, provided that subscriptions authorized under existing laws, by vote had prior to the adoption of the Constitution, should not be affected. In an action upon the bonds, the Supreme Court of the United States held that the Constitution annulled the power of a town to make a donation, or to loan its credit, to a railroad company after its adoption; and moreover, that as the town had no authority to make a contract to give money to the railroad company, and the acceptance by the company was an undertaking to do nothing which it was not bound to do, before the authority of the town to make, or to engage to make, a donation came into existence, no valid contract arose from such offer and acceptance. Such acceptance was not regarded as an engagement to locate and build the road through the town. There was, therefore, no consideration for the town's promise to give, even if the popular vote could be considered as a promise. There was no contract to be impaired; and a contract should be clearly proved before the federal Constitution is invoked for its protection.[1]

In like manner, where a town in the State of New York imposed as a condition precedent to subscribing for stock and delivering the town bonds, that the road should be located and constructed through the town, and this condition was not complied with prior to the first day of January, 1875, when the amendment to the Constitution of the state went into effect, prohibiting any town from loaning its credit in aid of any corporation, or from subscribing for its stock or bonds, the Court of Appeals of that state held that the power to issue the bonds thereupon ceased; that inasmuch as commissioners appointed by the town could neither issue the bonds nor subscribe for the stock until the condition was complied with, they could not issue the bonds upon an agreement by the railroad company to comply with the condition

[1] Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625.

so as to give the company any right to the bonds upon a subsequent compliance with it after the adoption of this constitutional amendment.[1]

276. **But completed subscriptions or contracts to subscribe** for the stock of a railroad company, made in pursuance of legislative authority previously given, are not affected by the adoption of a constitutional provision abrogating the power to subscribe. Thus, a board of supervisors having the power to subscribe for the stock of a railroad company and to issue bonds therefor when the road should be open for traffic, ordered a subscription, which the company accepted just before the new Constitution took effect. This was regarded as a binding contract, which authorized the subsequent delivery of the bonds, although the power to enter into such a contract was, after the adoption of the Constitution, withdrawn. The subsequent delivery of the bonds was only the performance of a binding contract made before the authority to make it was annulled. The Constitution of a state cannot be allowed to impair a contract, any more than its statutes can. The subscription being valid, the bonds issued for the sum subscribed are also valid.[2]

Bonds valid by the Constitution and laws of a state, as expounded by the authorities whose duty it is to administer those laws, cannot be impaired in obligation by any subsequent action of the legislature or judiciary.[3] When bonds have been sold upon the faith of decisions of the Supreme Court of a state establishing their validity, they cannot be invalidated in the hands of persons who have already purchased them in good faith, by a subsequent reversal of the former decisions of that court.[4]

When a subscription in aid of a railroad has been made in any legal form, and the conditions precedent have been complied with, a contract exists which may be enforced by mandamus.[5] Cred-

[1] Falconer *v.* Buffalo & Jamestown R. R. Co. 69 N. Y. 491.

[2] County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631.

[3] Thomson *v.* Lee County, 3 Wall. 327; Havemeyer *v.* Iowa County, 3 Wall. 294; Gelpcke *v.* City of Dubuque, 1 Wall. 175.

[4] United States *v.* Supervisors of Lee County, 2 Biss. 77; 3 Wall. 327.

[5] People *v.* Ohio Grove Township, 51 Ill. 192; State *v.* Linn County Court, 44 Mo. 504; Selma & Gulf R. R. Co. *ex parte*, 45 Ala. 696; Commissioners of Roads, &c. *v.* Shorter, 50 Ga. 489; Napa Valley R. R. Co. *v.* Supervisors of Napa County, 30 Cal. 435; California Northern R. R. Co. *v.* Butte County, 18 Cal. 671.

itors of the company may then rely upon such subscription for the payment of the company's debts to them as implicitly as upon any other assets of the company, although the company may subsequently abandon all proceedings under its charter on account of its insolvency.[1]

277. The corporate existence of a railroad company cannot be called in question in a suit upon municipal bonds issued to it, when it has been a corporation *de facto* from the date of its organization, whether it be a corporation *de jure* or not.[2] The issuing of the bonds to a railroad company is an admission that it is a corporation.

Neither can the corporate existence of a municipality or other organization, which has exercised the functions of a corporation by issuing its bonds under its corporate seal, signed by its officers, be questioned by itself in a suit upon the bonds. Whether it has been organized according to law or not it is concluded by its acts.[3]

A company is none the less a railroad company, within the meaning of an act authorizing municipal subscriptions to the capital stock of railroad companies, because its charter vests it with the power to carry on also the business of a coal mining or manufacturing company. If the people of a county think well of the undertaking, and that it will be a benefit to them, it is a matter for their judgment; and having the authority of law to subscribe in aid of it, the matter of the expediency of the enterprise is not for the reconsideration of the courts.[4]

It is no defence to a municipal bond, that the corporation for whose benefit it was issued was not organized within the time limited by its charter, or that the charter was obtained by fraud, or that it has been forfeited by misuser or nonuser. Advantage can be taken of the forfeiture of the charter of a corporation only by process in behalf of the state instituted directly against the corporation for the purpose of avoiding the charter. Until such

[1] Morgan County *v.* Thomas, 76 Ill. 120.

[2] Commissioners of Douglas County *v.* Bolles, 94 U. S. 104; County of Leavenworth *v.* Barnes, 95 U. S. 70, 73; Darlington *v.* La Clede County, 4 Dill. 200; and see Coleman *v.* Board of Supervisors, 50 Cal. 493.

[3] Bonham *v.* Board of Education of Harrisonville, 4 Dill. 156.

[4] County of Randolph *v.* Post, 93 U. S. 502.

forfeiture has been judicially declared in this way, it cannot be availed of in collateral suits.[1]

A town having voted and issued bonds as a corporation is estopped in favor of a *bonâ fide* holder to set up that it was not incorporated.[2] Although the authority to subscribe to the stock of a railroad company be confined "to any incorporated town or city," this language will embrace towns and cities afterwards incorporated at any time before the subscription is made.[3]

IV. *Ratification of Bonds irregularly issued and Waiver of Conditions.*

278. Bonds issued in contravention of statute may be legalized by subsequent legislation.[4] It is competent for the legislature to impose upon a municipal corporation the payment of bonds, which are just obligations, but which, from some irregularity or omission in the proceedings creating them, cannot be enforced at law.[5] Having the power to authorize the issue of the bonds originally, it can by a retrospective act cure defects occasioned by the irregular execution of the authority conferred. The question with the legislature is one of policy, and its determination is conclusive.[6]

While municipal aid bonds issued without compliance with legislative authority may ordinarily be legalized by subsequent legislation, this cannot be done when the Constitution of the state has in the mean time prohibited the legislature from authorizing the issue of such bonds, except on condition that two thirds of the qualified voters of the municipality assent thereto at an election.[7]

[1] County of Macon *v.* Shores, U. S. Supreme Ct. 17 Albany L. J. 35; Olcott *v.* Bynum, 17 Wall. 44, 58; Smith *v.* County of Clark, 54 Mo. 58; Kayser *v.* Trustees of Bremen, 16 Mo. 88, 90.

[2] Aller *v.* Town of Cameron, 3 Dill. 198.

[3] Lewis *v.* City of Clarendon, U. S. C. C. Ark. 6 Reporter, 609.

[4] Cooper *v.* Town of Thompson, 13 Blatchf. 434; Barton County *v.* Walser, 47 Mo. 189; Williams *v.* Town of Duanesburgh, 66 N. Y. 129; Town of Duanesburgh *v.* Jenkins, 57 N. Y. 177; Belo *v.* Com'rs of Forsythe County, 76 N. C. 489.

[5] New Orleans *v.* Clarke, 95 U. S. 644.

[6] Ritchie *v.* Franklin County, 22 Wall. 167; Thomson *v.* Lee County, 3 Wall. 327; St. Joseph Township *v.* Rogers, 16 Wall. 644, 666; Campbell *v.* City of Kenosha, 5 Wall. 194; Putnam *v.* City of New Albany, 4 Biss. 365; National Bank of Cleveland *v.* City of Iola, U. S. C. C. 9 Kans. 689; Supervisors *v.* Wis. Cent. R. R. Co. 121 Mass. 460. Some cases in state courts hold, however, that the legislature cannot legalize illegal votes in aid of a railroad. Atchison, Topeka & Santa Fé R. R. Co. *v.* Com'rs of Jefferson Co. 17 Kans. 29; Marshall *v.* Silliman, 61 Ill. 218; Wiley *v.* Silliman, 62 Ill. 170.

[7] Sykes *v.* Mayor, &c. of Columbus, 5 Reporter, 501.

The measure of the authority of the legislature after the adoption of the constitutional restriction is fixed by that. In order to ratify and legalize a loan previously made, the legislature is obliged to conform to this constitutional limitation of its powers. It cannot then validate the bonds by the mere expression of its consent or ratification.[1]

In Illinois it is the settled doctrine that while under the Constitution of 1848 it was competent for the legislature to bestow directly upon a county, without requiring a previous vote of the people, the power to subscribe for stock in railroad companies;[2] yet, as the power to subscribe is not a subscription, and there is nothing binding until the corporate authorities have actually made a subscription under the power, the legislature has no authority to pass an act rendering a void election and subscription valid, and thereby compel the corporation to incur a debt against its own wishes for such purpose.[3]

These decisions were followed by the Supreme Court of the United States, because they determined the construction of a peculiar provision of the Constitution of the state, though the construction was evidently contrary to the views of the Supreme Court.[4]

The act of a municipal corporation may be ratified, although it be *ultra vires*, so long as it is not within any constitutional prohibition.[5]

279. A municipal corporation may waive conditions contained in its subscription to a railroad company, or it may, by its action, be estopped to take advantage of them.[6] It would be an unreasonable restriction of the rights and powers of a municipal corporation to hold that it did not possess the power to alter

[1] Sykes *v.* Mayor, &c. of Columbus, *supra*; Hardenbergh *v.* Van Keuren, 4 Abb. N. C. (N. Y.), 43.

[2] Town of Keithsburg *v.* Frick, 34 Ill. 405.

[3] County of Richland *v.* People, Chicago Legal News, 43, for Oct. 26, 1878; Cairo & St. Louis R. R. Co. *v.* City of Sparta, 77 Ill. 505; Wiley *v.* Silliman, 62 Ill. 170; Marshall *v.* Silliman, 61 Ill. 218; and see Quincy, Mo. & Pacific R. R. Co. *v.* Morris, 84 Ill. 410; Ryan *v.* Lynch, 68 Ill. 160; Barnes *v.* Town of Lacon, 84 Ill. 461.

[4] Township of Elmwood *v.* Marcy, 92 U. S. 289.

[5] Brown *v.* Mayor, &c. of New York, 63 N. Y. 239.

[6] County of Randolph *v.* Post, 93 U. S. 502; Grand Chute *v.* Winegar, 15 Wall. 373; County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631; Converse *v.* City of Fort Scott, 92 U. S. 503; Muller *v.* Pondir, 55 N. Y. 325; Barnard *v.* Campbell, 55 N. Y. 456, 457.

its legally made contract by waiving conditions found to be injurious to its interests, or that it could not, like other parties to a contract, estop itself. Thus, if the delivery of the bonds be made conditional upon the completion of the road, or of a certain portion of it, by a time specified, and the municipality, before that date, by its proper officers, declares the road completed to its satisfaction, and delivers the bonds and receives the stock subscribed for, its action constitutes a waiver and an estoppel, which prevent it from afterwards objecting that the contract was not performed in time.[1]

When a subscription has been made for the benefit of a railroad company, conditioned upon the compliance of the company with certain terms, as for instance the completion of a portion of the road within a specified time, the delivery of the bonds may be suspended by the officers whose duty it is to issue the bonds, or by the same authority that ordered the subscription, as for instance the county court.[2]

280. A municipality may be estopped by its course of dealing with the railroad company to interpose a defence of irregularity in the exercise of the power of issuing bonds; and its position then in regard to the company is similar to that which it occupies to *bonâ fide* holders of the bonds without notice.[3] A distinction is to be observed that ratification by acquiescence, or by affirmative acts, has been established only in cases of irregularities in the exercise of the power to issue bonds, and not in any case where there was a total want of power to issue the bonds.

But the doctrine of estoppel as against a municipal corporation does not apply in respect to acts done in the exercise of a prohibited power; as for instance the issuing of bonds in violation of a constitutional restriction upon the power of municipal corporations

[1] County of Randolph *v.* Post, *supra;* Commonwealth *v.* Pittsburg, 43 Pa. St. 391.

[2] Cooper *v.* Sullivan County, 65 Mo. 542.

[3] Rogers *v.* Burlington, 3 Wall. 654, 667; Bissell *v.* City of Jeffersonville, 24 How. 287; Supervisors *v.* Schenck, 5 Wall. 772, 781; Butler *v.* Dunham, 27 Ill. 474, 477; People *v.* Cline, 63 Ill. 394, per Walker, J.; Logan County *v.* City of Lincoln, 81 Ill. 156; New Haven, Middletown & Willimantic R. R. Co. *v.* Town of Chatham, 42 Conn. 465; 10 Am. Railw. R. 168; Steines *v.* Franklin County, 48 Mo. 167, 176, 185; Barrett *v.* County Court of Schuyler County, 44 Mo. 197, 201; State *v.* Van Horne, 7 Ohio St. 327, 331; Shoemaker *v.* Goshen Township, 14 Ohio St. 569, 587; Town of Bennington *v.* Park, 50 Vt. 178, a well considered case.

to create indebtedness.[1] Such a restriction operates upon the corporation itself; and it can neither be bound by its agents in creating an indebtedness in excess of the constitutional limit, nor by their acts in recognition of such indebtedness. The assent of all the tax-payers, or of all the inhabitants of the municipality, to the creation of such unauthorized indebtedness, or their recognition and confirmation of it after it has been created, would not make the debt valid, or estop the corporation to deny its validity.

281. A municipality may be estopped by its acts from taking advantage of irregularities in the vote authorizing a subscription. A town in Connecticut, for the purpose of aiding in the completion of a railroad, was authorized to guarantee a certain amount of the bonds of the railroad company after the completion of the road, provided, that at a town meeting the vote upon the question of guaranteeing the bonds should be taken by ballot, and the ballot boxes should remain open for the reception of the ballots not less than two hours. In the warning, calling the voters together, the selectmen explicitly notified them as to the precise propositions which were to be submitted for their action, and directed that those in favor of their adoption, and aiding the railroad, should deposit a ballot having the word "Yes" upon it, and that those who were opposed to the adoption of them should deposit a ballot with the word "No" upon it. The record of the meeting by the town clerk was that "the resolution was adopted: "Yes," 178; "No," 86." The vote was in fact taken by division of the house, and not by ballot, but neither the officers of the town nor any person in its behalf ever claimed or gave notice that it was not taken by ballot, until more than three years after, and until long after the railroad company had, in good faith, and with the knowledge of the town, issued the bonds which were to be guaranteed, and delivered them to contractors who had performed work, purchased materials, and expended money in reliance upon them, the contractors having taken them with an order upon the town for its guaranty of them when the work should be completed. Upon an application by the railroad company for a mandamus to compel the town to guarantee the bonds according to the vote, the Supreme Court of the state held[2] that

[1] McPherson *v.* Foster, 43 Iowa, 48.

[2] New Haven, Middletown & Willimantic R. R. Co. *v.* Town of Chatham, 42 Conn. 465; 10 Am. Railw. R. 168.

the votes, the record, and the subsequent conduct of the town and its inhabitants, subjected them to the operation of the law of estoppel as completely as if the town had become the makers of the bonds and had declared in them that it had complied with all the requirements of the law in issuing them, and had allowed them to pass into the hands of innocent holders; and that the town could not avail itself of the fact that the vote was illegally taken, or of a correction of the vote afterwards made by order of court. It was attempted in this case to charge the railroad company with notice of the illegality of the vote, on the ground that when the vote was taken the treasurer and managing director of the railroad company was present, and saw how it was done; but inasmuch as he was not acting officially, and his knowledge was not conveyed to any of the other directors of the company, it was held that the company was not affected by his knowledge. Of course, if notice of the illegality of the vote had been brought home to the company, it could have acquired no rights under it. Thus, in *People* v. *Cline*,[1] an application for a mandamus to compel the proper county authorities to issue bonds in aid of a railroad pursuant to a contract of subscription was decreed; on the ground that the company, at the time the contract of subscriptions was made, had notice of illegalities in the petition on which the election was held, and in the election itself.

282. A municipal corporation may by the payment of interest, or by holding stock received for the bonds, or by other acts, become bound to pay bonds issued in its name, although the execution of them was irregular, or without authority.[2] Ratification may also be inferred from long delay in taking advantage of an irregular or unauthorized issue of municipal bonds, though such ratification is doubtless more cautiously inferred in case of municipal corporations than it is as against private corporations, because experience shows that public officers do not guard the interests confided to them with the same vigilance and fidelity that characterize the officers of private corporations.[3] In *Pendleton County* v. *Amy*,[4] where it appeared that the county had received

[1] 63 Ill. 394; 7 Am. Railw. R. 373.

[2] County of Ray *v.* Vansycle, 96 U. S. 675; McKee *v.* Vernon County, 3 Dill. 210; Munson *v.* Town of Lyons, 12 Blatchf. 539; Luling *v.* City of Racine, 1 Biss. 314; Leavenworth, Lawrence & Galveston R. R. Co. *v.* Douglas County, 18 Kans. 169.

[3] Dillon on Municipal Bonds, p. 52.

[4] 13 Wall. 297.

in exchange for its bonds stock of a railroad company which it had held for seventeen years without questioning the validity of its bonds, it was not allowed to assert against an innocent holder of the bonds that they were issued in disregard of a condition requiring a popular election. The bonds contained no recitals, and no interest had been paid, so that the estoppel rested altogether upon the receipt and holding of the railroad stock.[1]

A municipality by accepting and holding stock of a railroad company, and issuing its bonds in aid of it under legislative authority, is thereby estopped from claiming as against any holder of them, entitled to the position of a *bonâ fide* purchaser for value, that there was any defect in the order for an election, or in the manner of holding it.[2]

V. *Negotiability of Municipal Securities.*

283. Without legislative authority municipal corporations cannot invest its obligations with the character and incidents of commercial paper, so as to give them immunity, in the hands of *bonâ fide* holders, from defences to which they would be subject in the hands of the original parties.[3] It is not essential, however, that the authority to give bonds a negotiable and commercial form and character should be given in express terms; but such authority may be inferred from authority to issue interest bearing bonds having a long time to run, in aid of railroads.[4] But ordinary corporation orders, warrants, and certificates of indebtedness, are not within this principle. Although negotiable in form and negotiable in character, so far as to enable the holder to sue in his own name, they do not exclude inquiry into the legality of their issue, or preclude defences in the hands of any holder.[5] The power to issue such warrants is doubtless implied as incidental to municipal corporations in carrying on their

[1] This case is regarded as an extreme application of the doctrine of Estoppel; but the decision is believed to be correct, while that in Marsh *v.* Fulton County, 10 Wall. 676, irreconcilable with it, is wrong. See Town of Bennington *v.* Park, 50 Vt. 178.

[2] Commissioners of Johnson County *v.* Jannary, 94 U. S. 202.

[3] Dillon's Munic. Corp. § 106; Mayor *v.* Ray, 19 Wall. 468; Knapp *v.* Mayor, &c. of Hoboken, 39 N. J. L. 394; Town of Hackettstown *v.* Swackhamer, 37 N. J. L. 191; Hamlin *v.* Meadville, 6 Neb. 227.

[4] City of Vicksburg *v.* Lombard, 51 Miss. 111.

[5] Mayor *v.* Ray, 19 Wall. 468; Town of Hackettstown *v.* Swackhamer, *supra*; Knapp *v.* Mayor, &c. of Hoboken, *supra*; Matthis *v.* Town of Cameron, 62 Mo. 504. *Contra*, Garvin *v.* Wiswell, 83 Ill. 215.

affairs; though the power to issue them is usually conferred by charter or statute.[1] Negotiable bonds issued by such corporations, in pursuance of a power conferred by the legislature, are valid commercial instruments; though if issued without such authority they are invalid, even in the hands of innocent holders.[2]

In respect to the implied power of corporations to issue negotiable securities, there is a wide distinction between ordinary commercial or business corporations and municipal corporations; for, while the former, according to the American doctrine, may borrow money and issue their negotiable securities therefor without legislative authority,[3] the latter either have no such implied power, or such power is very much limited. This distinction is founded in the general public policy which requires the maintenance of such a restraint upon public officers and public corporations. "Private corporations are much more vigilant and watchful of their interests than it is possible for public or municipal corporations to be."[4] Judge Dillon is therefore of opinion that public and municipal corporations have no implied power to borrow money even for their ordinary purposes, and incidentally no implied power to issue commercial securities for such purposes.[5] This view is dissented from by other authorities, which hold that where a municipality has lawfully created a debt, it has the implied power, unless restrained by its charter or a statute, to acknowledge the same by a bill, bond, or other negotiable instrument; that the power to contract the debt implies the right to issue the proper acknowledgment of it.[6] It is admitted, however, that in a broad sense the power to borrow money and issue bonds

[1] Mayor *v.* Ray, 19 Wall, 468, 477; Shirk *v* Pulaski County, 4 Dill. 209.

[2] St. Joseph Township *v.* Rogers, 16 Wall. 644, 659.

[3] See § 19.

[4] Dillon on Municipal Bonds, § 6.

[5] Municipal Bonds, p. 13. See, also, Police Jury *v.* Britton, 15 Wall. 566; Mayor *v.* Ray, 19 Wall. 468, cited by Judge Dillon; also, Shawnee County *v.* Carter, 2 Kans. 115; Town of Hacketstown *v.* Swackhamer, 37 N. J. L. 191; Knapp *v.* Mayor of Hoboken, 39 N. J. L. 394.

[6] City of Williamsport *v.* Commonwealth, 84 Pa. St. 487. This decision was made by a divided court. Paxson, J., giving the judgment of the court, criticises the authorities cited in the preceding note, and cites in support of the implied power of such corporations to borrow and issue securities for ordinary purposes: Bank of Chillicothe *v.* Mayor of Chillicothe, 7 Ohio, 354; Sturtevant *v.* City of Alton, 3 McLean, 393; Mullarky *v.* Town of Cedar Falls, 19 Iowa, 21; City of Galena *v.* Corwith, 48 Ill. 423; Mills *v.* Gleason, 11 Wis. 470; Clark *v.* City of Des Moines, 19 Iowa, 199; Ketchum *v.* City of Buffalo, 14 N. Y. 356. See, also, Tucker *v.* City of Raleigh, 75 N. C. 267.

therefor cannot be said to be among the implied powers of a municipal corporation. "For general purposes such power does not exist, for the reason that it is not necessary for the objects for which it was created. Thus, it has never been contended that a municipality may borrow money and issue bonds or notes for objects having no necessary relation to the performance of municipal duties."[1] As regards bonds issued to aid private corporations, there is no division of opinion. Municipal corporations have no implied power to issue such bonds.

284. Bonds issued by municipal corporations payable to bearer are negotiable instruments, and as such give the holder a good title, free of all prior equities between antecedent parties, to the same extent as bills of exchange and promissory notes.[2] The fact that they are issued under the seal of the corporation does not affect their negotiability.[3]

Municipal bonds payable to bearer are subject to the same rules as other negotiable paper. They are transferable by delivery, and when issued by competent authority pass into the hands of a *bonâ fide* purchaser for value before maturity freed from any infirmity in their origin. As with other negotiable paper, mere suspicion on the part of a purchaser that there may be a defect of title in the holder of such bonds, or even knowledge on the part of the purchaser of circumstances which would excite suspicion as to the title in the mind of a prudent man, is not sufficient to impair the title of the purchaser.[4] "Gross negligence," said Lord Denman,[5] "may be evidence of *mala fides*, but it is not the same thing." Nothing short of bad faith on the part of the purchaser will affect his title.

[1] Per Paxson, J., in City of Williamsport *v.* Commonwealth, *supra.*

[2] Commissioners of Marion County *v.* Clark, 94 U. S. 278; Thomson *v.* Lee County, 3 Wall. 327; Mercer County *v.* Hacket, 1 Wall. 83; Murray *v.* Lardner, 2 Wall. 110; Dutchess County Ins. Co. *v.* Hachfield, 1 Hun (N. Y.), 675; Welch *v* Sage, 47 N.Y. 143; Seybel *v.* National Currency Bank, 54 N. Y. 288; Garvin *v.* Wiswell, 83 Ill. 215; City of Mt. Vernon *v.* Hovey, 52 Ind. 563; Morris Canal & Banking Co. *v.* Fisher, 1 Stockt. (N. J.) 667; Morris Canal & Banking Co. *v.* Lewis, 1 Beas. (N. J.) 323; Boyd *v.* Kennedy, 38 N. J. L. 146; Hackett *v.* City of Ottawa, U. S. C. C. for N. D. Ill. 11 Chicago Leg. N. 82.

[3] Mercer County *v.* Hacket, *supra. Contra*, see Diamond *v.* Lawrence County, 37 Pa. St. 353; County of Armstrong *v.* Brinton, 47 Ib. 367.

[4] Cromwell *v.* County of Sac, 96 U. S. 51.

[5] Goodman *v.* Harvey, 4 Ad. & El. 870.

285. Municipal bonds issued under legislative authority, with blanks for the name of the payee, have the same negotiable quality as bonds complete when issued. A subsequent *bonâ fide* holder has implied authority to fill the blank with his name.[1] The rule that a deed must be complete when issued has no application in this country to negotiable bonds and other commercial paper drawn with a blank for the name of the payee. The addition following the blank of the words "his executors, administrators, or assigns," does not affect the negotiability of the bonds.[2]

286. A recital in a bond payable to bearer of the purpose for which it is issued, as "that it is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas; . . . . and for the payment of the said sum of money and the accruing interest thereon, in manner aforesaid, upon the performance of the said condition the faith of the aforesaid Humboldt Township, as also its property, revenue, and resources, is pledged," does not destroy the bond's negotiability. The words "upon the performance of the said condition" were declared not to refer to anything mentioned in the recital, for there was no condition there; but rather to a stipulation for the payment of the interest at a banker's "on the presentation and surrender of the respective interest coupons." In giving judgment the court say:[3] "The construction of the road as well as the subscription for stock were mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words 'upon the performance of the said condition' cannot, then, refer to anything mentioned in the recital, for there is no condition there."

A stipulation in the bond that the interest is payable at a

[1] White *v.* Vt. & Mass. R. R. Co. 21 How. 575; Hubbard *v.* N. Y. & Harlem R. R. Co. 36 Barb. (N. Y.) 286; Brainerd *v.* N. Y. & Harlem R. R. Co. 25 N. Y. 496; Ledwich *v.* McKim, 53 N. Y. 307; Boyd *v.* Kennedy, 38 N. J. L. 146.

[2] Dutchess County Mut. Ins. Co. *v.* Hachfield, 4 T. & C. (N. Y.) 158.

[3] Humboldt Township *v.* Long, 92 U. S. 642. See, also, Hotchkiss *v.* National Banks, 21 Wall. 354.

banker's on the presentation and surrender of the respective interest coupons does not destroy the negotiability of the instrument. Such presentation and surrender are implied.[1]

VI. *Rights of bonâ fide Holders of Negotiable Bonds of Municipalities.*

287. The circumstance that chiefly distinguishes municipal bonds from bonds of private corporations and from negotiable paper of individuals is, that municipal corporations have no inherent power to make such securities, but their power is in all cases derived from legislation; and therefore their authority to issue these securities is always open to question, unless they have estopped themselves by their action in relation to such securities, or by their recitals of authority contained in them, from denying that they are bound by them. Estoppel by their own acts, such as the payment of interest upon the securities, or long delay in raising any question of their validity, applies in favor of the original holders of the bonds, as well as to subsequent *bonâ fide* purchasers for value. This part of the subject has already been considered; estoppel by recital contained in the bonds themselves applies only in favor of subsequent purchasers who may be supposed to know nothing of the circumstances of the original issue of the securities, and to have bought them relying upon the recitals of authority contained in the bonds themselves. This part of the subject will be considered in the following sections as part of the law pertaining to the rights of *bonâ fide* purchasers and holders of municipal bonds.

288. As against the title of a bona fide holder of municipal bonds, irregularity, fraud, or misconduct on the part of the officers or agents of the corporation in issuing its bonds cannot be considered.[2] Want of power to issue the bonds is the only defence that is open to the corporation after it has put its bonds upon the market and they have passed into the hands of innocent holders for value.

A defective execution of bonds, as for instance an omission of

[1] Humboldt Township *v.* Long, 92 U. S. 642.

[2] Town of East Lincoln *v.* Davenport, 94 U. S. 801; Commissioners of Johnson County *v.* Thayer, 94 U. S. 631; Grand Chute *v.* Winegar, 15 Wall. 355; Railroad Co. *v.* Otoe County, 1 Dill. 338; Belo *v.* Com'rs of Forsythe County, 76 N. C. 489; Black *v.* Cohen, 52 Ga. 621; Lane *v.* Schomp, 20 N. J. Eq. 82.

the treasurer of a county to countersign its bonds as provided by statute, does not invalidate them.[1]

When a municipal corporation has in fact authority to issue negotiable bonds, and it proceeds to exercise this power, and to send into the market such bonds, which upon their face purport to have been issued in pursuance of a given law, the corporation cannot afterwards deny this affirmation as against holders who have purchased them for value and in good faith. It cannot claim that the conditions prescribed for the issue of the bonds had not been complied with; or that no occasion for their issue existed.[2]

289. **Three important rules governing municipal bonds** are laid down by Mr. Justice Hunt in a case before the Supreme Court of the United States, as follows:[3] —

"I. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, or that the fact exists or has taken place, this will be sufficient evidence of the fact to all *bonâ fide* holders of the bonds.[4]

"II. If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bonâ fide* holder seeking to enforce them.

"III. There must, however, be an original authority, by statute, to the municipality to issue bonds. Municipal corporations have not the power, except through the special authority of the legislature, to issue corporate bonds which will bind their towns;

[1] Melvin *v.* Lisenby, Supreme Court of Ill. 5 Cent. L. J. 15.

[2] County of Macon *v.* Shores, U. S. Supreme Ct. 17 Albany L. J. 35; Supervisors *v.* Schenck, 5 Wall. 772, 784; Merchants' Bank *v.* State Bank, 10 Wall. 604, 646; Commissioners of Douglas County *v.* Bolles, 94 U. S. 104; Converse *v.* City of Fort Scott, 92 U. S. 503; State of Ohio *v.* Board of Education of Perrysburg Township, 27 Ohio St. 96; Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13. *Contra*, Town of Eagle *v.* Kohn, 84 Ill. 292.

[3] Kenicott *v.* Supervisors, 16 Wall. 452; quoted and approved by Judge Dillon in Hnidekoper *v.* Buchanan County, 3 Dill. 175.

[4] See, also, Township of Rock Creek *v.* Strong, 96 U. S. 271.

neither have they the power to sell or mortgage the lands belonging to such towns, without special authority."

290. Although its agents or officers violated their instructions and their duty in issuing the bonds of a corporation having authority to borrow money and issue its bonds therefor, it is responsible for them to *bonâ fide* holders. Thus certain bonds of the city of Richmond having been confiscated under authority of the Confederate government during the late war, and the city having been directed by decree of court to issue to its receiver bonds in place of those so confiscated, the city council directed its officers to issue the bonds as directed by the decree; but to insert on the face of the bonds so issued a declaration that they were so issued in lieu of confiscated bonds. This direction was obeyed in the first issue of the bonds, but was disregarded in an issue to a subsequent purchaser, who paid value for the bonds in ignorance that they represented confiscated bonds. The city was held liable upon the bonds so issued.[1] Although the officers exceeded their authority in issuing the bonds in this manner, the city cannot avail itself of this defence. The very nature of such a bond is that it shall furnish authentic and conclusive evidence of the holder's title to it. Facility of transfer is one of the advantages belonging to this species of property, and this advantage would be destroyed if a purchaser should be required to look to the regularity of the transfer to all the various persons through whom the bond has passed. Bonds which are not negotiable may be assigned by a written assignment, but the assignee takes only an equitable title, and the bonds are in his hands subject to the same defences to which they would have been subject in the hands of any previous holder. But when upon a transfer new bonds are issued to the purchaser, they give him a legal title, unaffected by any defences which might have been taken against any prior holder.

The rights of a *bonâ fide* holder of bonds apparently issued in conformity to law are forcibly illustrated in the case of the bonds of the town of Lansing issued in aid of the Cayuga Lake Railroad Company. By statute the county judge was authorized, on a petition by a specified number of tax-payers, to ascertain, by judicial inquiry, whether the majority of the tax-payers of the

[1] De Voss *v.* City of Richmond, 18 Gratt. (Va.) 338.

town, in number and in taxable property, desired the town to issue its bonds in aid of a railroad company, and upon ascertaining such to be the fact he was authorized to appoint three commissioners to execute and issue bonds in behalf of the town, and invest them in the stock of the company. On a petition and proofs, the county judge adjudged that the bonds should be issued, and appointed commissioners for that purpose. Opposing tax-payers obtained a writ of *certiorari* for the review of the Supreme Court, which ultimately reversed the judgment. After the writ had been issued the commissioners executed the bonds and delivered them to the railroad company. It was held that although the writ suspended the operation of the judgment and the authority of the commissioners, yet the illegality and fraud in the issue of the bonds was no defence against one who had purchased them in good faith and for value, although they cast upon him the burden of proving himself such a purchaser.[1]

291. A purchaser of municipal securities need not look further than to ascertain that the corporation had authority by law to issue them and that upon their face they import a compliance with the law under which they were issued.[2] He has the right to presume that such securities were issued under circumstances which gave the requisite authority. The securities being executed by the proper municipal officers, the purchaser is under no obligation to ascertain whether they were authorized to execute these securities; and there is no distinction, in this respect, between securities issued by officers of the municipality having general powers to represent it in its fiscal transactions, and bonds

[1] Bailey *v.* Town of Lansing, 13 Blatchf. 424.

[2] Board of Commissioners of Knox County *v.* Aspinwall, 21 How. 539; Bissell *v.* City of Jeffersonville, 24 How. 287; Moran *v.* Commissioners of Miami County, 2 Black, 722; Woods *v.* Lawrence County, 1 Black, 386; Mercer County *v.* Hacket, 1 Wall. 83, 93; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Meyer *v.* City of Muscatine, 1 Ib. 384; City of Lexington *v.* Butler, 14 Ib. 282; Grand Chute *v.* Winegar, 15 Ib. 355; St. Joseph Township *v.* Rogers, 16 Ib. 644; Chambers County *v.* Clews, 21 Ib. 317; Cromwell *v.* County of Sac, 94 U. S. 351; Commissioners of Douglas County *v.* Bolles, 94 U. S. 104; County of Cass *v.* Shores, 95 U. S. 375; County of Henry *v.* Nicolay, 95 U. S. 619; Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Humboldt Township *v.* Long, 92 U. S. 642; Miller *v.* Town of Berlin, 13 Blatchf. 245; State *v.* Saline County Court, 48 Mo. 390; Belo *v.* Com'rs of Forsythe County, 76 N. C. 489; City of Vicksburg *v.* Lombard, 51 Miss. 111.

issued by officers acting under a special power in the particular transaction.[1] Not being required to look beyond the recitals of the bonds when he purchases them, he is not required, upon trial, to produce any evidence of the truth of those recitals. He cannot be defeated if such recitals are disproved upon the trial, for as against a *bonâ fide* purchaser of a negotiable security no defences are known to the law, except that the defendant never made the instrument, or that it is void by positive statute. Proof that any or all of the recitals are incorrect does not constitute a defence to a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions, or qualifications which it is alleged were not fulfilled.[2]

A statute authorized a town to loan its credit in aid of a railroad company by issuing its bonds, but expressly prohibited the making of the loan except on the condition that the written consent of a majority of the tax-payers, representing a majority of the taxable property of the town, should first be acknowledged and recorded, together with a copy of the assessment roll of the town, in the office of the county clerk. Without obtaining the consent of the requisite number of tax-payers, and without making any record as provided, the commissioners specially charged with the duty issued bonds which recited that they were issued pursuant to the statute. The town was held liable to a *bonâ fide* purchaser of the bonds, for authority had been conferred upon it to issue its bonds in aid of the railroad, and the commissioners were its officers expressly designated for this purpose, and the bonds issued by them purported to be made in compliance with the statute.[3]

[1] Miller *v.* Town of Berlin, *supra.*

[2] Commissioners of Marion County *v.* Clark, 94 U. S. 278; Town of Coloma *v.* Eaves, 92 U. S. 484; St. Joseph Township *v.* Rogers, 16 Wall. 644, 659; Huidekoper *v.* Buchanan County, 3 Dill. 175; Grand Chute *v.* Winegar, 15 Wall. 355; Smith *v.* County of Clark, 54 Mo. 58; City of Vicksburg *v.* Lombard, 51 Miss. 111; First Nat. Bank of St. Johnsbury *v.* Town of Concord, 50 Vt. 257.

[3] Miller *v.* Town of Berlin, 13 Blatchf. 245. A like decision, with reference to a similar statute of New York, was made by the Supreme Court of the United States, in Town of Venice *v.* Murdock, 92 U. S. 494. The court in this case refused to follow the decisions of the Court of Appeals of New York to the contrary, arising upon the same statute and similar facts, because these decisions do not present a case of statutory construction. See Starin *v.* Town of Genoa, 23 N. Y. 439; Gould *v.* Town of Sterling, 23 N. Y. 456; People *v.* Mead, 24 N. Y. 114; 36 N. Y. 224. These decisions assert that where

292. A recital in municipal bonds of compliance with a condition precedent, such as a popular vote favoring the subscription, when made by officers of the municipality who are invested with power to decide whether that condition has been complied with, is conclusive of the fact and binding upon the municipality, the recital itself being a decision of the fact by the appointed tribunal. The truth or falsehood of the assertion does not concern a purchaser of the bonds; he is bound in such case to look for nothing beyond the recital except legislative authority.[1]

This rule is now so firmly seated in reason and authority, that it cannot be shaken. It has been repeatedly affirmed by the Supreme Court of the United States. In a recent case before that court,[2] Mr. Justice Strong carefully restated the rule in the following terms: "Where legislative authority has been given to a

authority is given to an officer to execute and issue bonds, on the assent of two thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent, the verification amounts to nothing, subserves no purpose, and that a *bonâ fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a proposition; not that the statute so declares, or that such is the interpretation of the statute. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the tax-payers as the authority to the township officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two thirds of the resident tax-payers whether the supervisors and commissioners might act under the power. Per Strong, J., in Town of Venice *v.* Murdock, *supra*.

[1] San Antonio *v.* Mehaffy, 96 U. S. 312; Commissioners of Douglas County *v.* Bolles, 94 U. S. 104; County of Leavenworth *v.* Barnes, 94 U. S. 70; Commissioners of Johnson County *v.* January, 94 U. S. 202; Town of Coloma *v.* Eaves, 92 U. S. 484; St. Joseph Township *v.* Rogers, 16 Wall. 644; Town of Venice *v.* Murdock, 92 U. S. 494; Township of Rock Creek *v.* Strong, 96 U. S. 271; Pollard *v.* City of Pleasant Hill, 3 Dill. 195; Jordan *v.* Cass County, Ib. 245; Washburn *v.* Cass County, Ib. 251; Nicolay *v.* St. Clair County, Ib. 163; Judson *v.* City of Plattsburg, Ib. 181; Smith *v.* Tallapoosa County, 2 Woods, 574; Sala *v.* City of New Orleans, 2 Woods, 188; Flagg *v.* Mayor, &c. of City of Palmyra, 33 Mo. 440; Smith *v.* County of Clark, 54 Mo. 58; Belo *v.* Com'rs of Forsythe County, 76 N. C. 489.

The case of Marsh *v.* Fulton County, 10 Wall. 676, so far as it contains any assertions inconsistent with this rule, is not to be regarded. That case is not, however, really inconsistent, because it was decided upon the ground that the subscription was made for the stock of a different corporation from that for which the people had voted.

The rule of the United States courts is also that of most of the state courts. Society for Savings *v.* City of New London, 29 Conn. 174; Evansville, Indianapolis & Cleveland Straight Line R. Co. *v.* City of Evansville, 15 Ind. 395; Commissioners of Knox County *v.* Nichols, 14 Ohio St. 260.

[2] Town of Coloma *v.* Eaves, 92 U. S. 484.

municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription; and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, this recital, that it has been made in the bonds issued by them and held by a *bonâ fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." This rule is of unquestionable application in all cases where the recital is of facts peculiarly within the knowledge of the persons to whom the power to issue the bonds had been conditionally granted.[1]

Judge Dillon, in an essay on this subject, after an examination of the decisions of the Supreme Court of the United States, says: "The principle adopted, and the reasoning of the court by which it is sustained, lead, it would seem, logically to the conclusion (although there is, perhaps, no case in the Supreme Court where the facts required a direct decision of the point), that where the power to issue the bonds is given upon the condition of a previous vote in favor of the proposition, that the public or municipal officers can, *where no vote whatever has been taken, or the proposition has been voted down*, bind the county or municipality by the false recitals in such unauthorized bonds, provided they are issued by the officers intrusted by the statute with the power. Under this doctrine, limitations upon the exercise of the power intended to prevent fraud and to secure a compliance with the conditions upon which the bonds are authorized are of little practical value, and generally prove illusory."[2]

293. A recital in municipal bonds that they were issued in pursuance of a subscription made by the supervisors of the county, in conformity to the provisions of a certain statute, estops

[1] Marcy *v.* Township of Oswego, 92 U. S. 637; and see Humboldt Township *v.* Long, 92 U. S. 642. In the latter case Mr. Justice Miller delivers a dissenting opinion in which he criticises this doctrine, and declares that the reasoning on which it is founded was examined for the first time in Town of Coloma *v.* Eaves, *supra*, and that the case in which the doctrine was first announced, Knox County *v.* Aspinwall, 21 How. 539, is not supported by the English case on which it was based.

[2] Law of Municipal Bonds in 2 South. Law Rev. N. S. p. 437; also published as a monograph, p. 26.

the county from setting up, against a *bonâ fide* holder of the bonds, that the authority to make a subscription with all its legitimate consequences had expired before the subscription was made. After assuring a purchaser that the subscription was made at a date when the county had the power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that the subscription was not made until a later date when authority to make it had been abrogated by constitutional provision.[1]

A recital that the bonds of a township are issued under and by virtue of the act incorporating the railroad company, and in accordance with the vote of the electors of the township in pursuance of such act, was held to estop the township from denying that the terms of the act had been complied with.[2]

But if there be no law authorizing a subscription in aid of a railroad, a recital in a municipal bond that it is issued in payment of a subscription made in pursuance of a vote of the people at an election specified, the recital, instead of estopping the municipality to claim the invalidity of the bonds, is notice to the holder of the illegality of the subscription.[3]

An erroneous reference in the recitals of a bond to the act under which the bonds were issued does not affect their validity.[4]

Where the common council of a city was authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three fourths of the legal voters of the city, the council, reciting such a petition, adopted a resolution to subscribe, and authorized the execution and delivery of bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three fourths of the legal voters had petitioned for the same,

[1] County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631. In the Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625, the recitals made direct reference by its title to the act authorizing the bonds, but did not show that the subscription was made before the Constitution abrogated the authority to make it; and moreover, if a purchaser was bound to take notice of the constitutional provision, he was bound to know that the act under which the bonds purported to be issued conferred no power to make the donation after the Constitution went into effect.

[2] Town of Coloma *v.* Eaves, 92 U. S. 484. See, also, Belo *v.* Com'rs of Forsythe County, 76 N. C. 489; Westermann *v.* Cape Girardeau County, U. S. C. C. for Mo. 7 Cent. L. J. 353.

[3] Barnes *v.* Town of Lacon, 84 Ill. 461.

[4] Commissioners of Johnson County *v.* January, 94 U. S. 202.

as required by the charter. In a suit by an innocent holder for value it was held inadmissible for the city to show that three fourths of the legal voters of the city had not signed the petition for the stock subscription.[1]

294. The mere issue of bonds containing a recital that they were issued under and in pursuance of a legislative act was, in the leading case of *Knox County* v. *Aspinwall*,[2] declared to be a sufficient basis for an assumption by the purchaser that the conditions on which the municipality was authorized to issue them had been complied with; and that the purchaser was not bound to look further for evidence of such compliance, though the recitals in the bonds did not affirm it. This position was supported by the citation of a case in the Exchequer Chamber.[3] Although this rule has never been reversed by the Supreme Court of the United States, doubts have been expressed respecting its correctness to its full extent; and while a recital that a condition precedent, such as a vote for subscription, has been complied with, is acknowledged to be conclusive proof of its performance with a *bonâ fide* purchaser, yet the mere execution and issue of the bonds without such recital is not regarded as conclusive of the question, but only *primâ facie* evidence of the regular issue of the bonds, until the contrary be shown.[4]

So it is with regard to any other prerequisite to the execution and issue of such bonds; such for instance as a requirement that thirty days' notice of the election to determine upon a subscription and issue of bonds be given. A recital of compliance with the statute made by the officers or agents intrusted with the power of issuing the bonds, and with the power of determining whether the conditions of fact made precedent to the exercise of the authority granted, is conclusive in a suit by a *bonâ fide* holder. "The

[1] Bissell *v.* City of Jeffersonville, 24 How. 287. See, also, Van Hostrup *v.* Madison City, 1 Wall. 291; Mercer County *v.* Hacket, 1 Wall. 83; St. Joseph Township *v.* Rogers, 16 Wall. 644; Mygatt *v.* City of Green Bay, 1 Biss. 292.

[2] 21 How. 539, 544; reaffirmed in Moran *v.* Commissioners of Miami County, 2 Black, 722, 732; Mercer County *v.* Hacket, 1 Wall. 83; Supervisors *v.* Schenck, 5 Ib. 772, 784; Meyer *v.* City of Muscatine, 1 Ib. 384; Darlington *v.* La Clede County, 4 Dill. 200; and approved in Steines *v.* Franklin County, 48 Mo. 167, 179; De-Voss *v.* City of Richmond, 18 Gratt. (Va.) 338, 356.

[3] Royal British Bank *v.* Turquand, 6 Ell. & Bl. 327.

[4] See dissenting opinion of Bradley, J., in Town of Coloma *v.* Eaves, *supra*; citing Lynde *v.* County, 16 Wall. 6, 13.

election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act." [1]

295. A condition in a legislative act that the amount of bonds which a township may vote in aid of a railroad shall not be above such a sum as will require a levy of more than one per cent. per annum on the taxable property of the township, to pay the yearly interest on the amount of bonds issued, does not invalidate, in the hands of *bonâ fide* holders for value, bonds issued in violation of such provision, when they contain a recital that they were issued in accordance with the act, and all prerequisite facts to the execution and issue of the bonds were by the act referred to the board of county commissioners, by whom the bonds were issued.[2] The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners when they were inquiring what the value of the taxable property of the township was; but the bonds are not invalid in the hands of a *bonâ fide* holder by reason of their having been

[1] Humboldt Township *v.* Long, 92 U. S. 642: The recital was that the bonds were "issued in pursuance of and in accordance with the act of the legislature." The recital in Board of Commissioners of Knox County *v.* Aspinwall, 21 How. 539, was very similar.

[2] Marcy *v.* Township of Oswego, 92 U. S. 637. "It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders, had signed, or that three fifths of the legal voters had voted for the subscription. These are all extrinsic facts bearing not so much upon the authority vested in the board to issue the bonds, as upon the question whether that authority should be exercised. They are all, by the statute, referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound when he purchased to look beyond the act of the legislature and the recitals which the bonds contained." Per Strong, J.

voted and issued in excess of the statutory limit as shown by the rolls. Whatever may be the right of the township as against those who issued the bonds, it cannot set up against a *bonâ fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act.[1]

It is to be observed in reference to this case that the recital of compliance with the law is general and not specific, and that the facts showing the illegality of the bonds appeared of record in the township. Judge Dillon remarks that the case affords, perhaps, a more striking illustration than any previously decided by the court, that the purchaser may implicitly rely upon the recitals of the bonds made by the proper officers, that the authority to issue them has arisen, and that he need not look elsewhere to ascertain this fact.[2]

Where a legislative act, under which township bonds purport to be issued, did not on its face show the purpose of the bonds, except by reference "to the order and proclamation of the township officers" in calling an election previously had, but the bonds recited that they were issued "for the purpose of aiding internal improvements in said township," and the general legislation of the state showed that "internal improvements" meant such public improvements as might legitimately be aided by taxation, Judge Dillon was inclined to think that the purchaser might assume without inquiry, *aliunde* the bonds and legislative act, that the bonds were issued under competent legislation; although they were in fact issued to aid in the improvement of a water power and the erection of a water-mill owned by private persons.[3]

A constitutional restriction upon the amount of indebtedness a municipal corporation may create is binding upon a *bonâ fide* purchaser of its negotiable securities; and if such securities are issued in excess of the constitutional limit they are void, even in the hands of such a purchaser. He cannot presume that indebtedness in excess of the constitutional limitation was authorized in any way. He is not only bound to know that the power of the

[1] See, also, Humboldt Township *v.* Long, 92 U. S. 642, per Strong, J.; Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Darlington *v.* La Clede County, 4 Dill. 200; Nicolay *v.* St. Clair County, 3 Dill. 163.

[2] Municipal Bonds, p. 33.

[3] Guernsey *v.* Burlington Township, 4 Dill. 372.

corporation is limited, but also to ascertain whether the bonds he is purchasing have been issued in compliance with the law.[1]

296. When, however, the statute authorizing the issuing of municipal bonds declares absolutely that they shall be void in case a condition precedent be not complied with, they will in that case be void in whosesoever hands they may be.[2] A statute of the State of Missouri[3] provided that "before any bond hereafter issued by any county shall obtain validity or be negotiated," it shall be registered by the state auditor, who shall certify upon it that all conditions precedent required by law, and by the contract under which the bonds are issued, have been complied with. Subsequently county bonds were issued in aid of a railroad company before the company had complied with conditions upon which the issue of the bonds had been authorized by a vote of the people; and to evade the statute, they were antedated to a date prior to the passage of the act. They were held void in the hands of an innocent holder.

It may be that when a municipal bond contains no recitals on its face of the authority under which it is issued, and the want of power to issue it appears upon the records of the municipal corporation, the bonds may be void, even in the hands of a *bonâ fide* holder. Such at any rate was the decision of the Supreme Court of Kansas.[4]

297. When bonds purport to be issued under the authority of a statute referred to, but recite on their face facts inconsistent with the statute, they are not valid in the hands of any holder. Thus where the act authorizing a loan provided that the bonds should be disposed of at not less than their par value, and the money invested in the stock of a railroad company, and the bonds referring to the act recited that they were issued "for value received in the stock of the Monticello and Port Jervis Railroad Company," they showed upon their face that they were issued in violation of the act, and therefore void.[5]

[1] McPherson *v.* Foster Bros. 43 Iowa, 48; Mosher *v.* Independent School Dist. of Ackley, 44 Iowa, 122.

[2] Anthony *v.* Jasper County, 4 Dill. 136, following the principle in Bayley *v.* Taber, 5 Mass. 286; and see, also, Town of Eagle *v.* Kohn, 84 Ill. 292.

[3] Laws 1872, p. 56.

[4] Lewis *v.* Bourbon County, 12 Kans. 186, 221.

[5] Harton *v.* Town of Thompson, Court of Appeals of N. Y. 1878, 17 Albany Law J. 334; and see McClure *v.* Township of Oxford, 94 U. S. 429.

Several state courts have held that a purchaser of municipal securities is chargeable with notice of any defect in the power of the municipality to issue them, which is disclosed by the corporate records;[1] and that the recitals of authority in the bonds are not conclusive.[2]

298. **Municipal bonds issued in excess of the authority conferred by the legislature are void** in whosesoever hands they may be. A county having authority to subscribe to the stock of a railroad company to such amount as should be fixed by a majority of the voters of the county, and to pay the subscription *by issuing bonds of the county for the amount of the stock subscribed for*, has no power to issue bonds for a larger amount and dispose of them at a discount in order to raise a sum sufficient to pay the amount of stock subscribed for in cash.[3] The power to issue such bonds should be strictly pursued; and the fact that the county has made a subscription, payable in cash, does not justify the issue of bonds to any greater amount, or in any other way than the legislature provided for. The power to sell the bonds to raise money to pay for the stock was not given by the act. Therefore, the county may be enjoined at the instance of a tax-payer from levying a tax to pay the interest or principal of the over-issue of bonds. But *bonâ fide* holders without notice would not be affected.

299. **A purchaser of municipal bonds cannot claim protection as a bona fide holder where he has notice** that any of the essential proceedings prescribed by law with reference to their issue have been dispensed with. He is chargeable with notice of that which the law requires him to know, and with notice of that which he might have ascertained by the exercise of reasonable diligence after being put upon inquiry. When the bonds refer to the statute under which they were issued, a purchaser is bound to take notice of the statute and of all its requirements; such for instance as a requirement that the statute shall not take effect until its publication in a certain paper, when the date of the bonds

[1] Starin *v.* Town of Genoa, 23 N. Y. 439; Gould *v.* Town of Sterling, Ib. 456; People *v.* Mead, 24 N. Y. 114; *S. C.* 36 N. Y. 224.

[2] Veeder *v.* Town of Lima, 19 Wis. 280.

[3] Daviess County Court *v.* Howard, 13 Bush (Ky.), 101; and see City of Atchison *v.* Butcher, 3 Kans. 104.

is such as to show that the law could not have taken effect at the time of the election held to authorize the issue of the bonds.[1]

As against a railroad company for the aid of which a municipality has issued its bonds, or as against others who do not occupy the position of *bonâ fide* holders for value without notice, the defence is generally open that the conditions on which the proper exercise of the power to issue the bonds depended have not been complied with.[2]

VII. *Enforcement of Municipal Bonds.*

300. A provision authorizing municipal corporations to exercise the local power of taxation to the extent necessary to meet their bonds, such as is usually contained in acts authorizing them to issue negotiable bonds in aid of public improvements, enters into and becomes a part of the obligation of the contract between such corporations and the holders of the bonds.[3] The power thus given cannot be withdrawn until the contract is satisfied. A subsequent statute or constitutional provision of the state abrogating or repealing the statute authorizing the levying of taxes to meet the interest or principal of such bonds, is in violation of the Constitution of the United States, and therefore invalid. The statutory authority to exercise the power of taxation to meet these engagements is as much a part of the contract as if it had been written out at length in the bonds.[4]

This principle is illustrated by the leading case of *Von Hoffman* v. *City of Quincy*,[5] in the Supreme Court of the United States. When the bonds in question were issued there were laws in force which authorized and required the collection of taxes to meet the interest as it should accrue. A subsequent statute limited the

[1] McClure *v.* Township of Oxford, 94 U. S. 429. See, also, George *v.* Oxford Township, 16 Kans. 72; Mygatt *v.* City of Green Bay, 1 Biss. 292.

[2] Dillon on Munic. Corp. § 108; Columbus County *v.* Clews, 21 Wall. 317; Union Pacific R. R. Co. *v.* Lincoln County, 3 Dill. 300; Same *v.* Merrick County, Ib. 359; Portland & Oxford Central R. R. Co. *v.* Hartford, 58 Me. 23; People *v.* Cline, 63 Ill. 394.

[3] Riggs *v.* Johnson County, 6 Wall. 166, 194; City of Galena *v.* Amy, 5 Wall. 705, 709; Von Hoffman *v.* City of Quincy, 4 Wall. 535; Rees *v.* City of Watertown, 19 Wall. 107, 120; Lansing *v.* County Treasurer, 1 Dill. 522; United States *v.* Jefferson County, 6 Reporter, 486.

[4] City of Dubuque *v.* Illinois Cent. R. R. Co. 39 Iowa, 56; Hasbrouck *v.* City of Milwaukee, 25 Wis. 122; Western Saving Fund of Philadelphia *v.* City of Philadelphia, 31 Pa. St. 175; Beckwith *v.* English, 51 Ill. 147; Vance *v.* City of Little Rock, 30 Ark. 435, 440, 441.

[5] 4 Wall. 535.

amount of taxes the corporation could levy and collect. "The amount permitted to be collected by that act," say the court, "will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The Act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right, — of no practical value, — and render the protection of the Constitution a shadow and a delusion."

Where there is a special provision for the levy and collection of taxes for the payment of such bonds, the bondholder may require the enforcement of this provision without first obtaining execution and attempting to enforce it.[1] Judgment must, however, be obtained upon the bonds, so as to establish the validity and amount of the debt.[2] A demand should then be made upon the municipal corporation to perform its duty in levying the necessary tax and making payment.[3]

301. A state can no more impair an existing contract by

[1] Knox County *v.* Aspinwall, 24 How. 376; Benbow *v.* Iowa City, 7 Wall. 313.

[2] Heine *v.* Levee Commissioners, 19 Wall. 655; Town of Queensbury *v.* Culver, 18 Wall. 83, 92; Bath County *v.* Amy, 13 Wall. 244.

[3] Dillon on Municipal Bonds, p. 58.

a constitutional provision than by a legislative act; both are within the prohibition of the national Constitution.[1] A constitutional provision of a state so limiting the rate of taxation which municipal corporations may exercise as to prevent their making the payment of the interest or principal of bonds previously issued, under statutes authorizing the levy of sufficient taxes for that purpose, is invalid and inoperative to the same extent that a statute to the same effect would be. The Constitution of Arkansas[2] provided that "no county shall levy a tax to exceed one half of one per cent. for all purposes, but may levy an additional one half of one per cent. to pay indebtedness existing at the time of the ratification of this Constitution." But this was held not to impair or lessen in any degree the obligation of a previous statute under which municipal bonds were issued and by which the levy of a special tax of sufficient amount to meet the bonds was authorized.[3] "It is no answer," said Caldwell, J., "to say that the present Constitution does not utterly destroy the right given by the act under which the bonds were issued; that a limited tax may still be levied. If, by any subsequent act of the state, the rate could be limited to five mills, it could be limited to one, or taken away altogether." The court remark upon the excessive amount of taxes that would be required in the case before it to meet the obligations of the county; but while suggesting to the creditors the expediency of reducing the volume of indebtedness, declared this to be a matter between the county and its creditors, over which the court had no control; and accordingly directed a peremptory writ of mandamus for the levy and collection of a tax sufficient to meet the interest and principal of the bonds.[4]

302. Mandamus is the proper remedy to compel a municipal corporation to appropriate moneys already in its treasury to the payment of its bonds, or to levy such tax as may be necessary for that purpose.[5] This writ may be issued in all cases

[1] Gunn *v.* Barry, 15 Wall. 610, 623.

[2] Const. 1874, art. xvi. § 9.

[3] United States *v.* Jefferson County, U. S. C. C. for the Eastern District of Ark. 7 Am. Law Rec. 154, for Sept. 1878; 6 Reporter, 486; 7 Cent. Law Jour.; *S. C. note* to United States *v.* Miller County, 4 Dill. 233.

[4] And see United States *v.* County of Clark, U. S. Supreme Court, 1878, 5 Reporter, 131.

[5] Walkley *v.* City of Muscatine, 6 Wall.

to compel the performance of some official or corporate act by a public officer or corporation, when there is no other adequate remedy, and the right to such performance is clear. It is also the proper remedy to compel the delivery of bonds which a municipality having the power to issue has contracted to deliver in aid of a railroad.[1]

This is not only the proper but the only remedy to compel the performance of the duty of collecting taxes and paying municipal bonds. The Supreme Court, even in an exceptional case, where the process of mandamus had proved ineffectual for a period of fourteen years, on account of successive resignations of municipal officers, refused to exercise equity jurisdiction to compel payment.[2] To enforce a bond given by a county in behalf of a township within the county, mandamus will be issued against the county or its proper officers to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued.[3]

303. A mandamus does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty. Thus if a municipality has exercised its power of taxation to the full extent of its authority the court cannot by mandamus order the levying of a further tax. There may be some other remedy for enforcing the debt against it in such case, but at any rate this remedy does not apply.[4]

Mandamus may also be used to enforce ordinary county warrants; but inasmuch as such warrants are payable out of the ordi-

481; State of Ohio *v.* Board of Education of Perrysburg Township, 27 Ohio St. 96; Cincinnati, Wilmington & Zanesville R. R. Co. *v.* Clinton County, 1 Ohio St. 77; Atchison, Topeka & Sante Fé R. R. Co. *v.* Jefferson County, 12 Kans. 127; United States *v.* County Court of Vernon County, 3 Dill. 281.

[1] New Haven, Middletown & Willimantic R. R. Co. *v.* Town of Chatham, 42 Conn. 465; People *v.* Cline, 63 Ill. 394; Union Pacific R. R. Co. *v.* Commissioners of Davis County, 6 Kans. 256; *in re* Hamilton & North Western Ry. Co. 39 Q. B. Upper Canada, 193.

[2] Rees *v.* City of Watertown, 19 Wall. 107; Heine *v.* Levee Commissioners, 19 Wall. 655. In the absence of a statute to the contrary, the writ of mandamus abates with the death, resignation, or removal of the officer to whom it is directed.

[3] County of Cass *v.* Johnston, 95 U. S. 360; Jordan *v.* Cass County, 3 Dill. 185; County of Cass *v.* Shores, 95 U. S. 375.

[4] United States *v.* County of Clark, 95 U. S. 769; Supervisors *v.* United States, 18 Wall. 71. United States *v.* Mayor, &c. of City of New Orleans, 2 Woods, 230; United States *v.* Miller County, 4 Dill. 233; Vance *v.* City of Little Rock, 30 Ark. 435; State *v.* Walker, Supreme Court of Mo. Oct. T. 1878, 7 Cent. L. J. 390.

nary revenues of the county, and are not, like the negotiable bonds of a county, expressly provided for by a special tax, the writ cannot command the levying of a tax specially for the payment of such warrants, but can only command the proper officers to discharge the duty they owe by charter or by statute to the warrant-holders.[1]

304. A writ of mandamus issued by the Circuit Court of the United States for the collection of a tax cannot be interfered with or obstructed by the courts or the legislature of the state in which the tax is to be collected. It does not matter that prior to the application for the mandamus a court of the state had perpetually enjoined the proper officers against making such levy; for the mandamus, when so issued, is regarded as a writ necessary to the jurisdiction of the federal court which had previously attached, and to enforce its judgment, and in such case the state court cannot be regarded as in prior possession of the case.[2] If the officers obey the state court in such case and refuse to levy and collect the tax, the federal court will attach them for contempt and punish them.[3]

Municipal and county officers who disobey a writ of mandamus requiring them to levy a tax to pay judgments against the municipality or county are also liable to damages for the non-performance of this duty. But the measure of such damages is not the amount of the claim;[4] and in fact, only nominal damages and costs seem to be recoverable.[5] Judge Drummond, in the Circuit Court of the United States, while feeling compelled by the decisions of the Supreme Court to allow only nominal damages, said that if left free to adopt his own view it would be to allow the plaintiff the interest upon the money that would have been collected, if the defendants had performed their duty. "Under the

[1] Supervisors *v.* United States, 18 Wall. 71; United States *v.* Vernon County, 2 Cent. L. J. 771.

[2] Riggs *v.* Johnson County, 6 Wall. 166; Vance *v.* City of Little Rock, 30 Ark. 435, 452.

[3] United States *v.* Silverman, 4 Dill. 224.

[4] Dow *v.* Humbert, 91 U. S. 294. In this case the court assumed that it might have been in consequence of ignorance, inadvertence, or mistake on the part of the officers, although it does not exactly appear how, or under what circumstances, that inference was drawn. Per Drummond, J., in Newark Savings Institution *v.* Panhorst, 7 Biss. 99.

[5] Newark Savings Institution *v.* Panhorst, *supra*. In this case the judgment was for $585 and costs.

decisions of the Supreme Court," added the judge, "these judgments against municipal corporations, where people do not choose to pay them, are not very potential. It was held that where the laws of a state declare that there can be no execution against the property of a municipal corporation, the federal courts are without power to collect judgments by the imposition of taxes, although that may be the only resource.[1] And now it has been decided, substantially, that the officers of such corporations are not liable for more than nominal damages if they refuse to perform the duty which the law imposes on them. The result is, judgments can be obtained in the courts against these municipalities, upon the bonds or coupons they have issued, and their obligations construed with the greatest rigor; but after judgments, and when it is attempted to make their property available to satisfy them, then arises the real difficulty of the case, in the effort to overcome which the old legal maxim, that there is no wrong without a remedy, seems sometimes to be reversed."

305. The holder of municipal bonds is not limited to the special tax provided for in the act authorizing the issue of the bonds, but may look to the funds of the county raised by general taxation, unless the act expressly provides that the bonds shall not be paid in any other manner.[2] Thus, where bonds in aid of a railroad were issued pursuant to a law which authorized a levy of a special tax "not to exceed one twentieth of one per cent. upon the assessed value of taxable property for each year," which was a provision wholly inadequate to meet the interest of the bonds, Mr. Justice Strong, speaking for the Supreme Court, said: "It is incredible that the legislature intended to deny to the purchasers of the bonds any right to look for payment beyond such a meagre provision; or, if it was so intended, that the intention would not have been expressed in precise terms. In the absence of any express declaration that the creditor's right to claim payment shall not reach beyond the fund derived from the small special tax, we cannot think the legislature proposed rendering the bonds unsalable or almost worthless in the hands of those who

[1] Rees *v.* City of Watertown, 19 Wall. 107.

[2] United States *v.* County of Clark, 95 U. S. 769; *S. C.* 96 U. S. 211. See Supervisors *v.* United States, 18 Wall. 71; State *v.* Shortridge, 56 Mo. 126, which are not inconsistent with this proposition.

might be so unfortunate as to hold them. Such an intention would have defeated the object sought to be secured by giving authority for their issue. Nor can we think that the legislature intended to set a trap for purchasers, and lead them to suppose they were obtaining valuable securities, when, in fact, they would obtain what was worth next to nothing. The statute justifies no implication of any such legislative intention. If it be said that the legislature, in limiting the special tax allowed, contemplated no issue of bonds beyond what one twentieth of one per cent. would pay, and did not anticipate the improvidence of purchasers who might buy bonds issued in excess of that sum, it may be answered that still a larger issue was in fact authorized."

It is the general rule in the United States that debts incurred by or in the name of a public or *quasi* corporation, under legislative authority, cannot under any circumstances be enforced against the private property of the inhabitants,[1] although the inhabitants of towns in New England are personally liable for judgments against town corporations.[2] Consequently bonds issued in pursuance of a statute authorizing county courts to issue bonds, in the name of the county, on behalf of unincorporated townships voting the aid, cannot be enforced, either against the township or its inhabitants; but judgment may be recovered against the county issuing the bonds, and although it cannot be enforced against the county or its property, or its tax-payers at large, the county court may be compelled by mandamus to levy and collect a tax to pay the same.[3]

[1] Rees *v.* City of Watertown, 19 Wall. 107; Jordan *v.* Cass County, 3 Dill. 185.

[2] Dillon on Municipal Corporations, §§ 446, 687, 693 n.; Beardsley *v.* Smith, 16 Conn. 368.

[3] Jordan *v.* Cass County, 3 Dill. 185.

CHAPTER VIII.

PROMISSORY NOTES AND UNSECURED BONDS OF CORPORATIONS.

I. Promissory notes of corporations, 306–311.

II. Unsecured bonds of corporations, 312–316.

I. *Promissory Notes of Corporations.*

306. Corporations, except as restrained by express provisions, or by necessary implications, may use any form of security, or any kind of acknowledgment of indebtedness that an individual may use.[1]

Where the nature and character of the business of a corporation warrant the use of ordinary negotiable instruments, such as promissory notes and bills of exchange, the company has an implied authority to issue them. In the United States this implied authority is held to belong to all ordinary commercial corporations, when used for proper corporate purposes;[2] yet in England the courts have at different times denied the power to almost all corporations,[3] except those whose business is banking, or some kind of financial enterprise which necessarily involves the making or

[1] Pusey *v.* New Jersey R. R. Co. 14 Abb. Pr. N. S. 434.

[2] Moss *v.* Averell, 10 N. Y. 449, 457; Olcott *v.* Tioga R. R. Co. 27 Ib. 546. "No question is better settled upon authority than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note, payable either at a future day or upon demand, when such note is given for any of the legitimate purposes for which the company was incorporated." The American courts have fully established this principle, and from general considerations of policy and of law it must be regarded as correct. Barker *v.* Mechanic Fire Ins. Co. of N. Y. 3 Wend. (N. Y.) 94; Clark *v.* Farmers' Woolen Mfg. Co. 15 Ib. 256; Smith *v.* Eureka Flour Mills Co. 6 Cal. 1; Richmond, Fredericksburg & Potomac R. R. Co. *v.* Snead, 19 Gratt. (Va.) 354.

[3] Bateman *v.* Mid-Wales Ry. Co. L. R. 1 C. P. 499; Peruvian Ry. Co. *v.* Thames & Mersey M. Ins. Co. L. R. 2 Ch. 617; Broughton *v.* Manchester W. Works Co. 3 B. & A. 1; East London W. Works Co. *v.* Bailey, 4 Bing. 283; Dickinson *v.* Valpy, 10 B. & C. 128; Burmester *v.* Norris, 6 Ex. 796; Steele *v.* Harmer, 14 M. & W. 831; 4 Ex. 1; Bramah *v.* Roberts, 3 Bing. N. C. 963; Thompson *v.* Universal Salvage Co. 1 Ex. 694. See, however, Moseley Green Coal, &c. Co. *in re*, 4 De G., J. & S. 756.

negotiating of negotiable instruments.[1] In some cases where such a power cannot be inferred from the nature of the business, it is conferred by implication from the general words of the charter or the articles of association.[2] Thus the memorandum of association of a company formed for the purpose of purchasing a concession from the government of Peru for the construction of a railway contained the provision, that "in order to the attainment of the main object of the company they may do, either in the United Kingdom, or Peru, or elsewhere, whatsoever they from time to time think incidental or conducive thereto." It was held that this language was wide enough to authorize the company to make negotiable instruments. "It is, I think," said Lord Cairns, L. J., "beyond all possibility of dispute, that, if they think it incidental or conducive to the attainment of the concession, when the instalments become or are about to fall due, in place of making calls on their shareholders, they should give a bill of exchange, payable at a future day, for the amount of the instalments, they may do so."[3]

307. **The English decisions are not altogether uniform in this matter,** for while there are a few decisions which really rest upon the principle that a corporation may make such ordinary negotiable paper as is incidental to the nature of its business,[4] yet the cases generally are the other way. Thus, in *Bateman* v. *Mid-Wales Railway Company*,[5] the question was whether a railway company could lawfully bind itself by accepting a bill of exchange. Earl, C. J., delivering the judgment, said: "I am of opinion it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that any should be valid or not, according as the consideration between the original parties was good or bad, or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the ac-

[1] General Estates Co. *in re*, L. R. 3 Ch. 758, 761; Land Credit Co. of Ireland *in re*, L. R. 4 Ch. 460.

[2] Peruvian Ry. Co. *v.* Thames & Mersey M. Ins. Co. L. R. 2 Ch. 617, 624.

[3] Peruvian Ry. Co *v.* Thames & Mersey M. Ins. Co. *supra*.

[4] Moseley Green Coal & Coke Co. *in re*, 4 De G., J. & S. 756; Peruvian Ry. Co. *v.* Thames & Mersey M. Ins. Co. *supra*.

[5] L. R. 1 C. P. 499, 509.

ceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loan beyond their borrowing powers. It would be a pernicious thing to hold that, in respect to the former, the corporation might be sued by an indorser, but in respect of the latter, not."

There is no question, however, that corporations of all kinds may draw checks in the usual course of business. This power is necessary for every corporation, and being necessary, is implied.[1]

A distinction is taken between bills and notes, by a corporation having no power to borrow, given in its ordinary business, as for instance in the purchase of property essential for its use, and bills and notes given for actual loans of money. In like manner, an existing debt may be paid by means of bills of exchange, when the debt could not be created originally in that way.[2] "Borrowing and lending," says Stuart, V. C., "are things perfectly well understood, and although the procuring of money by means of a bill of exchange confers the same benefit on the person who procures it as if he were to borrow the amount, yet it is impossible to consider transactions upon bills of exchange given in this manner as borrowing and lending within the meaning of the company's articles of association. It has been well decided that a balance due a bank by a company which keeps an account with it, and has had the benefit of the money, is a debt, but not a loan in the proper sense."

308. Accommodation paper. — As a corollary to the proposition that a corporation may make negotiable paper, it follows that such paper, though made for accommodation, is binding upon the maker in the hands of a holder in good faith for value. It may not be within the scope of the corporate powers to make accommodation paper; but having a general power to make negotiable paper, the doctrine of *ultra vires* does not apply when in a particular case a corporation abuses this general power, and issues accommodation paper which comes into the hands of a holder for

[1] Waterlow *v.* Sharp, L. R. 8 Eq. 501; Serrell *v.* Derbyshire, &c. Ry. Co. 9 C. B. 811.

[2] Cefn Cilcen Mining Co. in *re*, L. R. 7 Eq. 88; and see Waterlow *v.* Sharp, L. R. 8 Eq. 501.

value without knowledge of such abuse.[1] The corporation is estopped from setting up the defence of *ultra vires* in such case, because it has virtually represented that the paper was given for some legitimate purpose, and having the general power to give negotiable paper, a purchaser cannot be presumed to know that any particular obligation was given for an unauthorized purpose.[2]

309. Paper given to enable a corporation to prosecute an unauthorized business. — The same reasoning applies as well to obligations given by a corporation for money borrowed to enable it to prosecute a business which it had no power to engage in. The corporation having the general power to borrow money, it would be pressing the doctrine of *ultra vires* to an extent not to be tolerated, to allow it to evade the payment of the money on the ground that it expended the money in prosecuting an unauthorized business, even though the lender knew the money would be so expended, provided the business itself be free from any intrinsic immorality or illegality.[3]

310. Of course if the holder has notice that the instrument was improperly issued by the corporation, he cannot enforce it; and such notice may be either actual or constructive. A limitation in the power of the corporation in respect to issuing a security imposed by statute or by the charter of the company, must be taken notice of by every person dealing with it. In the leading English case upon this subject, Cockburn, C. J., delivering the judgment, said:[4] "It is contended that the plaintiffs, not having had any knowledge of the want of such authority, are

[1] Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; *S. C.* 3 Am. R. 322. See, also, Farmers' & Mechanics' Bank *v.* Empire Stone Dressing Co. 5 Bosw. (N. Y.) 275; Maitland *v.* Citizens' Nat. Bank of Baltimore, 40 Md. 540; *S. C.* 17 Am. R. 620; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; Merchants' Banking Association *v.* N. Y., &c. White Lead Co. 35 N. Y. 505; Central Bank *v.* Empire Stone Dressing Co. 26 Barb. (N. Y.) 23; Morford *v.* Farmers' Bank of Saratoga County, Ib. 568; Bridgeport City Bank *v.* Empire Stone Dressing Co. 30 Barb. (N. Y.) 421; Olcott *v.* Tioga R. R. Co. 27 N. Y. 546; State Bank *v.* U. S. Pottery Co. 34 Vt. 144; Smead *v.* Indianapolis, Pittsburg & Cleveland R. R. Co. 11 Ind. 104.

[2] Bissell *v.* Michigan South. & North. Ind. R. R. Cos. 22 N. Y. 258, 289, 290, per Selden, J.; City of Lexington *v.* Butler, 14 Wall. 282.

[3] Bradley *v.* Ballard, 55 Ill. 413; 8 Am. R. 656.

[4] Balfour *v.* Ernest, 5 C. B. N. S. 601; 28 L. J. (C. P.) 170, quotation from latter report; and see Hood *v.* New York & N. H. R. R. Co. 22 Conn. 502.

entitled to treat this bill as a bill taken from a partner having a general power of drawing bills, and which might be considered as drawn for partnership purposes, though, in fact, it was drawn by one partner in fraud of the others. There is, however, this difference between that case and the present one, that then, there would be no reason for supposing that the bill was not given for partnership purposes, whereas here, the bill was taken by the plaintiffs in payment of a debt, for the discharge of which they knew it was not within the general scope of the authority of the directors of this society to draw bills, for the plaintiffs must have known that the company were constituted under a deed of settlement, to which, being registered pursuant to the statute, the plaintiffs could have had access, and the case which has been referred to by my brother Willes shows that a man must be taken to have knowledge of the contents of a deed of this kind."

311. Notes under corporate seal. — Ordinary promissory notes and other instruments usually made without sealing, when issued by corporations, are not infrequently issued under the corporate seal. The seal in such cases is practically without effect. It does not affect the negotiability or the validity of the instrument.[1]

A note signed by the directors or other officers of a corporation by their individual names, although they describe themselves as such officers, is not the note of the corporation unless it purports to be made on behalf or on account of the company. Even the affixing of the corporate seal to such a note does not make it the note of the corporation, where the parties do not otherwise use terms to exclude their personal liability.[2] But a note signed by individual officers of a corporation "by and on behalf of the said society," was held to be binding upon the company, and not upon the parties who signed it.[3] And so a note signed by individuals, "for" a corporation named, is binding upon the corporation if

[1] Connecticut Mut. Life Ins. Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co. 41 Barb. (N. Y.) 9; Halford *v.* Cameron's Coalbrook, &c. Ry. Co. 16 Q. B. 442; Aggs *v.* Nicholson, 1 H. & N. 165; Goodwin *v.* Robarts, L. R. 10 Ex. 337; General Estates Co. *in re*, L. R. 3 Ch. 758.

[2] Dutton *v.* Marsh, L. R. 6 Q. B. 361. The note in this case was as follows: "We, the directors of the Isle of Man Slate Co., limited, do promise to pay J. D. £1,600, with interest at 6 per cent. till paid, for value received." The company's seal was affixed.

[3] Aggs *v.* Nicholson, 1 H. & N. 165.

the signers had authority to bind it. But where such persons "jointly and severally" promised for a corporation, these words were considered as fixing the undertaking as a personal one.[1]

II. *Unsecured Bonds of Corporations.*

312. At common law a private corporation has the power to issue bonds not secured by mortgage, for any purpose for which it may lawfully contract a debt. No special legislative authority is needed unless some restriction is imposed by the company's charter, or by general enactment. "A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement."[2] Restrictions upon the issuing of bonds have been imposed in some states, and where this is the case such bonds can be issued only in the mode and for the purposes authorized. Bonds issued in disregard of such statutes are void.[3] They may be repudiated not only by the corporation itself, but by a subsequent mortgagee whose mortgage is not made expressly subject to them.

A railroad company unless restrained by statute has power to contract debts, and the power to acknowledge its indebtedness by making bonds under its seal.[4] This is a very different question from that which relates to the power of such corporation to mortgage its property without legislative authority.

313. A corporation having the power to borrow money for a specific purpose has the right to issue any instrument in acknowledgment of the debt which the parties may consider convenient. It may issue bonds for such debt without the aid of any statute in terms conferring the power to issue bonds.[5] Such corporation has the same power as an individual to issue any kind of instrument acknowledging its indebtedness and promising pay-

[1] Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347, cited approvingly by Bramwell, B., in Aggs *v.* Nicholson, *supra*.

[2] Commonwealth *v.* Smith, 10 Allen (Mass.), 448, per Hoar, J.

[3] Commonwealth *v.* Smith, *supra*.

[4] Commissioners of Craven *v.* Atlantic & N. C. R. R. Co. 77 N. C. 289.

[5] Miller *v.* N. Y. & Erie R. R. Co. 18 How. (N. Y.) Pr. 374; 8 Abb. Pr. 431; Dana *v.* Bank of U. S. 5 W. & S. (Pa.) 223.

ment. The bonds of a corporation having the power to borrow, but not the power to grant a mortgage to secure the loan, are valid although the mortgage is void. In such case when it is sought to enforce the bonds, the power to issue them is all the court has to do with, and the company is liable upon them without regard to the mortgage.[1]

A statute authorizing a railroad company to borrow money from time to time for maintaining and working the railroad, and to pledge the lands, tolls, and revenues, and to make bonds or debentures for securing the payment of the sums borrowed, does not restrict a company to the use of bonds or debentures rather than other evidences of debt.[2]

314. A statutory bond or debenture holder in England occupies a position quite different from that of a mortgagee; while the latter has a lien upon the tolls and traffic receipts of the undertaking, and may have a receiver of them appointed for the purpose of paying his claim, the former has no such lien or right to have a receiver appointed.[3] A judgment creditor might, prior to the Railway Companies Act of 1867, as against such bondholder, levy his execution upon the personal or real property of the company.[4] Although such creditor had recovered his judgment upon a debenture if his execution was paid before any of the other bondholders intervened, he might keep what he had received. He might bring a suit in behalf of himself and all other bondholders, but was not bound so to do. The non-priority clauses of the statute were regarded as applying between executions and not as between bonds.[5]

An English company owning land in Italy issued bonds or debentures binding their "estate, property, and effects," and it was claimed that they constituted a charge upon the land, and that the debenture holders could restrain a sale of it under a subsequent mortgage; but the master of the rolls held them to be merely bonds, and that they created no mortgage or lien; that

[1] Philadelphia & Sunbury R. R. Co. *v.* Lewis, 33 Pa. St. 33.

[2] Commercial Bank of Canada *v.* Great Western Ry. Co. of Canada, 3 Moore P. C. C. (N. S.) 295.

[3] Imperial Mercantile Credit Associa. *v.* Newry & Armagh Ry. Co. 2 Ir. Eq. 524; Preston *v.* Corporation of Great Yarmouth, L. R. 7 Ch. App. 655.

[4] Bowen *v.* Brecon Ry. Co. L. R. 3 Eq. 541, 548; Russell *v.* East Anglian R. Co. 3 Mac. & G. 104, 151.

[5] Imperial Mercantile Credit Asso. *v.* Newry & Armagh Ry. Co. 2 Ir. Eq. 524.

even if they had been mortgages they could not be preferred to subsequent mortgages which had been perfected by registry according to the law of Italy, although the mortgagees had notice, according to the English law, of the prior charge; and further, that the Italian court was the proper forum to exercise jurisdiction in the matter.[1]

315. **Prohibition against issuing notes for circulation as money.** — Bonds of a canal or railroad company issued in the course of its legitimate business do not fall within a statutory prohibition against issuing notes for a circulating medium in the similarity of a bank note, the intention of the statute being to prohibit the exercise of banking privileges.[2] It was urged that inasmuch as the legislature had conferred upon the canal company power to borrow money on mortgage to enable it to complete its work, this authority covered the whole scope of power possessed by the company, and it could not issue bonds without such mortgage; and it was insisted that the parties executing such bonds made themselves personally liable. But the Supreme Court of Pennsylvania held that the company had of necessity the right to enter into such obligations in carrying out the purposes of the corporation, and that the obligations were binding upon it.[3]

An insurance and loan company which was forbidden "to issue for circulation as money any of its own promissory notes in the nature of bank notes or certificates of deposit payable to bearer," having issued certain certificates of deposit payable to order, it was found as a fact that they were not intended for circulation as money. After an indorsement in blank by the payee, they in effect became payable to bearer; and it was admitted in point of law that they were fully negotiable; but it was decided that the issue of these instruments was not illegal, and that therefore the company was liable upon them.[4]

316. The issuing of income bonds for the payment of the

[1] Norton *v.* Florence Land & Public Works Co. 2 W. R. 123.

[2] McMasters *v.* Reed, 1 Grant (Pa.), 36; Hubbard *v.* New York, &c. R. R. Co. 36 Barb. (N. Y.) 286.

[3] McMasters *v.* Reed, *supra*.

[4] Mumford *v.* Am. Life Ins. & Trust Co. 4 N. Y. 463.

interest and principal of which the income of a railroad company is specifically pledged, does not debar the company of the legal right to execute a mortgage of its road and property to secure the payment of other bonds. The pledge of the income is binding upon the company, but is no incumbrance upon the property itself, which, under a subsequent mortgage, may be taken out of the possession of the company and applied to the payment of the mortgage debt.[1]

The Central Ohio Railroad Company having made a first and second mortgage of its property issued certain income bonds, wherein it was recited, that "for the punctual payment of the interest and principal of said obligations, and of others of like tenor, issued or to be issued, in preference to the payment of dividends on the capital stock of said company, the income arising from the road and its appurtenances is hereby specifically pledged;" subsequently the company executed a mortgage of its whole line, and was about to issue bonds under it, when the holders of certain of the income bonds filed a bill to restrain the sale of the mortgage bonds. It was contended in their behalf that the company could not, without a violation of their own obligations, tantamount to fraud, attempt to impair the unrecorded lien on their property by placing on record a mortgage designed to secure third mortgage bonds to be paid in order after the first and second mortgage bonds; and therefore that the company ought to be restrained from issuing the third mortgage bonds, which, in the hands of *bonâ fide* purchasers, without notice of the unrecorded lien of the income bonds, would be preferred. The Court of Appeals of Maryland held, however, that fraud could not be imputed to the company, in consequence of the issuing of the third mortgage bonds, and that it was not in any way precluded from executing such subsequent obligations. The terms of the income bonds were declared to be specific, and the holders of them confined to the preference therein set forth.[2]

[1] Perkins *v.* Deptford Pier Co. 13 Sim. 277, 281.

[2] Garrett *v.* May, 19 Md. 177

CHAPTER IX.

INTEREST AND INTEREST COUPONS.

I. The contract to pay interest, 317–320.
II. Negotiability of coupons, 321–326.
III. Order of payment of coupons, 327–331.
IV. Interest on overdue coupons and bonds, 332–336.
V. Suits upon coupons, 337–340.

I. *The Contract to pay Interest.*

317. The terms in which coupons are expressed are very different. Usually they are in the form of express promises to pay the interest due at fixed times to the bearer at a place designated.[1] In such case the instrument is a complete contract in itself, and may, when consistent with the terms of the bond, be declared on as such without reference to the bond. But sometimes a coupon is merely a memorandum of the interest due, and of the time and place of payment, without any express promise of payment.[2] In such case the coupon is not a complete instrument in itself, and can be declared on only in connection with the bond. Again, a coupon may be in the form of a draft for the interest in favor of bearer.[3] In such case, however, the coupon is not strictly a bill of exchange. It is not intended for acceptance. It is usually drawn against funds deposited to meet it, and is therefore more like a check. If such a coupon be construed as a mere token or ticket or warrant, indicating the time when and the place where the interest is due, it will satisfy the terms in which it is expressed, and be consistent with the bond and the purpose for which the coupon was devised.[4]

Whatever be the form of the coupon, its purpose is substantially the same, which is to afford to the holder evidence of his

[1] As in Thomson *v.* Lee County, 3 Wall. 327.

[2] As in Woods *v.* Lawrence County, 1 Black, 386.

[3] Sheboygan County *v.* Parker, 3 Wall. 93; Arents *v.* Commonwealth, 18 Gratt. (Va.) 750.

[4] Arents *v.* Commonwealth, 18 Gratt. (Va.) 750, 774.

right to demand the interest according to the provisions of the bond, and a convenient mode of collecting it; and to afford to the maker of the bond a convenient voucher of the payment of the interest.

The contract for the payment of the interest is generally fully defined by the bonds, while the coupon for the interest often expresses the contract very imperfectly. When such is the case, the instruments necessarily being construed together, the bond determines what the contract is. A coupon, also, which in terms differs from the contract contained in the bond, must, by construction, be made consistent with that contract; and in this connection the purpose for which the coupon is given is to be considered.

Coupons are often signed by a printed fac-simile of the autograph of the maker or of the officer empowered to execute the bonds; and this constitutes a legal signature, though not expressly authorized by statute.[1]

318. Usury laws do not generally apply to bonds issued by corporations. They are expressly excepted from the operation of the statutes in several states.[2] In England debentures may be issued at a discount, and the holders will be allowed to prove for the full nominal amount in proceedings for winding up.[3]

The usury laws apply to corporations, in the absence of special legislation, to the same extent as to natural persons, and corporations cannot, any more than individuals, legally sell their bonds, bearing the highest rate of interest, at a discount, for the purpose of borrowing money.[4]

A statute authorizing corporations to sell their bonds at a discount may have no application to foreign corporations, so that the

[1] Pennington *v.* Baehr, 48 Cal. 565; McKee *v.* Vernon County, 3 Dill. 210; Lynde *v.* County, 16 Wall. 6.

[2] Alabama, § 27; Arkansas, § 28; Dakota Territory, § 32; District of Columbia, § 34; Florida, § 35; Indiana, § 38; Iowa, § 39; Maine, § 43; Maryland, § 44; Michigan, § 46; Minnesota, § 47; Montana Territory, § 50; Nebraska, § 51; New Hampshire, § 53; New Jersey, 1 Rev. 1877, p. 514; Laws 1855, p. 500; New York, 2 R. S. 1875, p. 1166; Laws 1850, ch. 172; Vermont, § 64; Wisconsin, § 67. In several other states and territories there are no usury laws. See Jones on Mortgages, § 633.

[3] Anglo-Danubian Steam Nav. &c. Co. *in re*, L. R. 20 Eq. 339; Foss *v.* Harbottle, 2 Hare, 461; Regent's Canal Ironworks Co. *in re*, 24 W. R. 687; In Blakely Ordnance Co. *in re*, 8 Eq. 244, the Master of the Rolls, Romilly, allowed proof for only the sum actually advanced.

[4] Commissioners of Craven *v.* Atlantic & N. C. R. R. Co. 77 N. C. 289.

same provisions as to interest and usury apply to them that apply to private individuals.[1]

A special clause in a charter authorizing a company to borrow money on such terms as may be agreed upon by the parties overrides an existing general law upon the subject, and enables it to borrow at any rate of interest.[2]

Under a statute authorizing the sale of corporate bonds at less than par value, there can be no ground of objection to an exchange of the bonds for iron rails. It could make no difference whether the bonds were sold at a reduced rate and the iron rails bought for cash, or the bonds exchanged directly for the iron rails; the transaction might easily be made to assume either form.[3]

When a statute limits the rate of interest a corporation may pay for loans, but does not provide for the times of payment, it is a proper exercise of the power to make the interest payable semi-annually. So long as the specified rate be not exceeded, the payment of the interest may be regulated according to the usual course of dealing in borrowing money.[4]

319. The law of the place where a bond is made payable, as a general rule, determines whether it is usurious or not. If it be not usurious by that law, a plea of usury cannot be sustained, unless it alleges that the place of payment was inserted as a shift or device to evade the law of the place where the bond was made.[5]

When the rate of interest at the place where the bonds are made differs from that at the place where they are made payable, the parties may stipulate for either rate, and their contract will govern.[6]

The laws of the state where the corporation was organized and issued its bonds determine the question of usury as to such bonds, in a suit in the same state to enforce them, although they

[1] McGregor *v.* Covington & Lexington R. R. 1 Dis. (Ohio) 509.

[2] Morrison *v.* Eaton & Hamilton R. R. Co. 14 Ind. 110.

[3] Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372.

[4] Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372.

[5] Junction R. R. Co. *v.* Bank of Ashland, 12 Wall. 226; Butler *v.* Myer, 17 Ind. 77; Butler *v.* Edgerton, 15 Ind. 15.

[6] 1 Jones on Mortgages, §§ 656–663; Cromwell *v.* County of Sac, 96 U. S. 51, 62; Miller *v.* Tiffany, 1 Wall. 298.

are made payable in another state, whose laws are different.[1] The statute of such other state where the bonds are made payable might control in an action upon the bonds in that state.

II. *Negotiability of Coupons.*

320. Coupons which promise payment to bearer are in legal effect promissory notes by the law merchant, and possess all the attributes of negotiable paper.[2] The purchaser of such coupons is not an assignee of the causes of action, but he acquires title by delivery, and the promise to bearer is a promise to himself directly.[3] Even when the coupons themselves do not purport to be negotiable, if the bonds to which they belong are negotiable, the coupons are negotiable also, so long as they are not detached from the bonds. The title to negotiable interest coupons passes from hand to hand by mere delivery, and a transfer of possession is presumably a transfer of title, but does not import a guaranty of payment.[4]

321. Coupons are not rendered non-negotiable by the fact that they are not made payable to a particular person.[5] — Such coupons are to be taken in connection with the bonds to which they are annexed, and though not themselves negotiable instruments by the law merchant, they follow the instrument to which they are attached, and when that is negotiable the coupons are negotiable.[6] The obligation to pay the interest is to be found

[1] Commissioners of Craven *v.* Atlantic & N. C. R. R. Co. 77 N. C. 289.

[2] Mercer County *v.* Hacket, 1 Wall. 83; Thomson *v.* Lee County, 3 Wall. 327; Aurora City *v.* West, 7 Wall. 105; Clark *v.* Iowa City, 20 Wall. 583; Kennard *v.* Cass County, 3 Dill. 147; Chesapeake & Ohio Canal Co. *v.* Blair, 45 Md. 102, 110; Town of Cicero *v.* Clifford, 53 Ind. 191; Gilbough *v.* Norfolk & Petersburg R. R. Co. 1 Hughes, 410; Arents *v.* Commonwealth, 18 Gratt. (Va.) 750; Miller *v.* Town of Berlin, 13 Blatchf. 245; Cooper *v.* Town of Thompson, Ib. 434; Haven *v.* Grand Junction R. R. & Depot Co. 109 Mass. 88; Spooner *v.* Holmes, 102 Mass. 503; 3 Am. R. 502. *Contra*, but not authorities, Clarke *v.* City of Janesville, 1 Biss. 98; Myers *v.* York & Cumberland R. R. Co. 43 Me. 232.

[3] Cooper *v.* Town of Thompson, 13 Blatchf. 434, 437; City of Lexington *v.* Butler, 14 Wall. 282, 283.

[4] Ketchum *v.* Duncan, 96 U. S. 659.

[5] Smith *v.* County of Clark, 54 Mo. 58. The coupons in this case were in the following form: "State of Missouri. Bond No. 51. $35. The County of Clark will pay thirty-five dollars on this coupon on the first day of January, 1867, at the treasury of said county."

[6] McCoy *v.* Washington Co. 3 Wall. Jun. 381. The coupons were as follows: "Washington County Bonds. Warrants for thirty dollars interest on bond No. 108, payable in the city of New York, on the 15th of May, 1857." See § 323.

in the bond, not in the coupons. These are intended by the parties to be evidence of debt in the hands of the holder, and proof of payment when in possession of the debtor. By the contract of the parties and the usage of the country, they are sufficient evidence of a debt to the holder as against the obligors of the bonds. The possession of them is *primâ facie* evidence that the holder is the holder of the bond, or was so when they were cut off, and as such entitled to receive the interest.

322. Interest coupons, detached from bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and therefore subject to the same rules as bank bills or other negotiable instruments. Such coupons having been detached and sent to New York by express, on March 31, 1871, for presentation and payment, were on that day stolen from the express office, and on the third day of April following were purchased by the plaintiff in good faith at Albany. He was held to have acquired a valid title to them as against the true owner. The fact that the coupons are declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bond, or impair the title of one purchasing from another without production of the bond.[1] Though overdue, such coupons are still negotiable instruments, and one who has taken them before or after maturity may give a good title to another.[2]

A coupon for accrued interest, payable to bearer, is just as much a lien under the mortgage given to secure the bond as the bond itself; and it is just as much a lien after it is detached from the bond as before; and when held by another person as when held by the bondholder. The fact that the coupon is made payable to bearer shows that a severance from the bond was contemplated. It is part of the mortgage debt, and being made capable of separate transfer, an assignment of it carries a corresponding interest in the mortgage security. Upon a foreclosure of the

[1] Evertson *v.* National Bank of Newport, 66 N. Y. 14. The form of the coupons was as follows: "$35. The Indianapolis, Bloomington & Western Railway Company will pay the bearer, at its agency in the city of New York, thirty-five dollars, in gold coin, on the 1st day of April, 1871, for semi-annual interest on bond No. . A. P. Lewis, Secretary."

[2] Grand Rapids & Indiana R. R. Co. *v.* Sanders, 54 How. (N. Y.) Pr. 214; Arents *v.* Commonwealth, 18 Gratt. (Va.) 750.

mortgage the holder of a detached coupon is entitled to a *pro rata* distribution with the holders of the residue of the mortgage debt.[1]

323. But coupons not payable to bearer or order are not negotiable when separated from the bonds.[2] It is doubted whether the parties to an instrument can give it a negotiable character with all the incidents pertaining to negotiable papers when it is not in terms within the class of instruments known to the law as negotiable.[3] It is not essential that an interest warrant should be negotiable for the purpose of its serving as authority from the railroad company to its financial agent to pay the amount named in it upon presentation although detached from the bonds. "It is possible," says Mr. Justice Allen,[4] "that as between such agent and the debtor corporation the possession and presentation of the interest warrants at maturity would be evidence of an authority to receive the money by the person presenting it, even as against the true owner. But if this be conceded, it does not make them negotiable as between third persons. In this contract, as in others, its negotiability depends upon its terms; and the rule is, with certain exceptions not applicable to this case, that in instruments for the payment of money, if no one be designed as payee, either by name or as bearer, the instrument is not a promissory note. If these warrants are not promissory notes they are not negotiable; they are neither checks nor bills of exchange. . . . . The contract embodied in these interest warrants, so far as any contract can be implied, cannot, upon principle or within any well considered authority, be made an exception to the general rules by which the negotiability of promises for the payment of money is determined. There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these instruments would be could change

[1] Miller *v.* Rutland & Washington R. R. Co. 40 Vt. 399; Sewall *v.* Brainerd, 38 Vt. 364.

[2] Evertson *v.* National Bank of Newport, 66 N. Y. 14. The form of the warrant was as follows: "$35. Interest warrant for thirty-five dollars ($35), upon bond No. of the Danville, Urbana, Bloomington & Pekin Railroad Company. Payable in gold coin at the office of the Farmers' Loan and Trust Company in the city of New York, April 1, 1871.

"W. J. Ermentrout, Secretary."

See, also, Myers *v.* York & Cumberland R. R. Co. 43 Me. 232; Jackson *v.* York & Cumberland R. R Co. 48 Me. 147; Crosby *v.* New London, &c. R. R. Co. 26 Conn. 121.

[3] Cranch *v.* Credit Foncier of England, L. R. 8 Q. B. 374.

[4] Evertson *v.* National Bank of Newport, *supra.*

their legal effect." Therefore one who in good faith purchased such warrants after they had been stolen from the rightful owner acquired no better title to them than his vendor had and could convey, and the transaction was the same in legal effect as the purchase of any article of merchandise from one having no title or authority to sell.

Dividend warrants of the Bank of England payable to a particular person, without words making them transferable, were held not negotiable, although by custom they had been so treated for sixty years.[1]

324. **Overdue coupons**, like other overdue negotiable instruments, though in the hands of a *bonâ fide* purchaser for value, are subject to all the defences and equities that attach to ordinary *choses in action;* the purchaser takes no better title than the party from whom he received them had.[2]

A purchaser of overdue coupons takes only the title of the vendor, and therefore acquires no title at all to such coupons when they have been obtained by fraud or theft.[3]

The fact that past due coupons are attached to a bond at the time of it purchase does not invalidate the purchaser's title as a *bonâ fide* purchaser of the coupons thereafter to become due, and of the bond itself.[4] The burden of proof is upon the defendant to show the existence of any other facts which, in connection with the overdue coupons, might deprive the purchaser of the character of a *bonâ fide* holder.

325. **A coupon is ordinarily considered due** and payable, aside from the question of days of grace, on the day when the interest it represents is by the terms of the bond made payable.[5] It is not the less payable at such times because the bond provides that the interest shall be paid on presenting or surrendering the proper coupon. This evidence of title must be produced before

[1] Partridge *v.* Bank of England, 9 Q. B. 396.

[2] Arents *v.* Commonwealth, 18 Gratt. (Va.) 750.

[3] Gilbough *v.* Norfolk & Petersburg R. R. Co. 1 Hughes, 410.

[4] Miller *v.* Town of Berlin, 13 Blatchf. 245, 250.

[5] Arents *v.* Commonwealth, 18 Gratt. (Va.) 750, 776. The coupon in this case was as follows: "Coupon, city of Wheeling, guaranteed by the State of Virginia. Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond 269, due 1st January, 1867. M. Nelson, *Mayor.*"

the money it calls for can be demanded, and it must be surrendered when the money is paid. But this is just what the law requires of every holder of a negotiable security, and no more. Such a coupon, as to the time of its maturity is different from a note payable on demand. It becomes due without any demand or presentation.

326. Negotiable interest coupons are entitled to days of grace, like other negotiable instruments payable at a given day or on time; and therefore one purchasing them after the expiration of the time of payment specified, but before the expiration of the days of grace, is a purchaser before maturity.[1] Such coupons having every other characteristic of promissory notes, they cannot be excepted from the general rule which by commercial usage, sanctioned by law, is applied to every instrument, negotiable in its character, coming within the ordinary definition of bills of exchange or promissory notes. "It is probably true that they are regarded and treated, as well by promisor as promisee, as payable at the day, and paid as if, in terms, payable without grace; but this cannot destroy the character or change the legal effect of the instruments, the interpretation of which is for the courts. It is only as negotiable commercial paper that the plaintiffs, as a *bonâ fide* purchaser, could acquire a good title to the coupons from one having no title thereto; and he can only acquire such title by a purchase under the same circumstances that would give him a title to other commercial paper; and if there were no days of grace for the payment of these coupons they could not be transferred so as to give a good title."[2] If they were payable at a fixed day without grace, a purchaser after that day would take them as overdue paper, and would gain no better title than the vendor had. It is not doubted that a negotiable bond, payable at a given day or on time, is entitled to days of grace; and there can also be no doubt that negotiable coupons are entitled to the same privilege.

III. *Order of Payment of Coupons.*

327. Payment of coupons should be made in the order in which they fall due; and it is doubtless true that the holder

[1] Evertson *v.* National Bank of Newport, 66 N. Y. 14. See Cooper *v.* Town of Thompson, 13 Blatchf. 434, 438, where above case is cited.

[2] Per Allen, J., in Evertson *v.* National Bank of Newport, *supra*.

may in equity claim payment in this order; and it has sometimes been claimed that a holder of coupons separated from the bonds ought to be paid before the bondholder, because that would be the order of payment if the bonds and coupons were held by the same party. As between debtor and creditor the law, it is true, applies payment first to extinguish the interest; but where a part of the mortgage debt has been assigned, and the mortgage security is about to be appropriated to pay the debt, and is insufficient to pay the whole, mere priority of maturity does not give any right to priority of satisfaction.[1] Neither is the coupon holder entitled to priority over the holder of the bond from which it was detached in a final distribution of the proceeds of the whole mortgage property. The bond and the coupon are entitled to a *pro rata* distribution.[2]

The appointment of a receiver is for the protection of all parties interested in the mortgaged property. When therefore a subsequent mortgagee has obtained the appointment, he is not entitled to have the interest coming due on his mortgage paid out of the receipts of the road, to the exclusion of a prior mortgagee, upon the ground that the bonds secured by such subsequent mortgage are so drawn that the principal debt becomes due and payable if the interest be not paid.[3]

328. Priority of overdue interest. — A railway mortgage contained the following clause: "In case of default in the payment of interest or principal of any bonds, and a sale or other proceedings to coerce the same, all bonds which shall then be a lien in common therewith, and the interest accrued thereon, shall be considered, and shall in fact be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of said sale or other proceedings; but in no case shall the principal of any bond be considered due until twenty years from the date thereof." Upon a sale under the mortgage within the twenty years, it was held that the overdue interest warrants were entitled to no preference; and it was declared that the provision that no bond should be considered due until twenty years after its date was inserted merely to exclude any possible inference that a bondholder under

[1] Sewall *v.* Brainerd, 38 Vt. 364.

[2] Sewall *v.* Brainerd, *supra*; Miller *v.* Rutland & Washington R. R. Co. 40 Vt. 399.

[3] Brown *v.* N. Y. & Erie R. R. Co. 22 How. Pr. (N. Y.) 451.

any circumstances might bring an action for the principal before it became due by its terms.[1]

329. But coupons which the bondholders had presented for payment, and which they had reason to suppose were paid by the company, are not entitled to share in the proceeds of sale as against such bondholders, although they were in fact taken up by one who advanced the money under an agreement that they were to be delivered to him uncancelled, as security for the advances.[2] The bondholders had a direct interest in having the coupons paid, so as to preserve the value of their security. They delivered them up to the company for payment, and supposed they were paid. If they had known the true state of the case they might have refused to assign the coupons, and thus, by allowing an accumulation of interest, to have impaired the value of their security. And they could have caused a foreclosure of the mortgage for a default in the payment of interest. The court regarded the position of the bondholders who had presented their coupons and received payment in this way as being equally strong as if they had purchased their bonds in the belief that the coupons had actually been paid. As against such purchasers there could be no question that the person who had advanced the money for the coupons would be estopped from claiming that he took a transfer of them.[3]

Of course the mortgage remained a security for the payment of the coupons until paid, whether detached or not. As against the railroad company, the persons who advanced money for the coupons in this way could enforce the mortgage. The company had not paid the coupons, and was in no way harmed by their payment by a third person under this arrangement; but the bondholders never agreed that he should take and hold the coupons, and they did not agree that he should have any interest in the mortgage security. The mortgage security proving insufficient to pay the entire debt, their equity is superior to the equity of the party who advanced the money; and as against their equity he cannot be subrogated to the claim under the mortgage.

[1] Dunham *v.* Cincinnati, Peru, &c. Ry. Co. 1 Wall. 254.

[2] Union Trust Co. of N. Y. *v.* Monticello & Port Jervis Ry. Co. 63 N. Y. 311; Virginia *v.* Chesapeake & Ohio Canal Co. 32 Md. 501.

[3] Haven *v.* Grand Junction R. R. & Depot Co. 109 Mass. 88.

330. **But one who has taken up coupons in this way may claim payment from any surplus** left after payment of the bondholders. Although having taken up the coupons due on mortgage bonds of a corporation at its request, upon an understanding between him and the corporation that they were not extinguished as against it, but were to be held by him in place of the persons who presented them, he may be estopped to come forward as a purchaser and assignee of the coupons when the transaction appeared to be a payment of the coupons by the company, and was supposed by its creditors to be a payment of them and not an assignment, and the security proves to be insufficient to pay the entire mortgage debt; yet if there be a surplus of proceeds remaining after full satisfaction of the claims of all the other creditors whose claims were covered by the mortgage, he is not estopped to maintain a claim for the amount of the coupons paid by him, with interest from the date of payment.[1] The only parties who could object to this proceeding would be the other creditors secured by the same mortgage; and when their dividend will not be diminished by allowing the claim of one who has taken up coupons under such an arrangement, there can be no objection to the allowance of the claim. They cannot object to the claim, although the supposed payment of the coupons at maturity may have induced them to make purchases of the bonds, because having received their entire debt they cannot be said to have suffered any loss or inconvenience from the mode in which the coupons were taken up.

331. **But when the transaction is not upon its face a payment, but rather a transfer,** as for instance when the coupons are not redeemed by the corporation that made them, or at its office or other place where the coupons are made payable, there is no presumption of the payment and extinguishment of the coupons. When therefore a corporation which had previously paid its coupons at its own office directs the holders to take the coupons to a bank where they would receive payment, and the holders there received the amounts due on the coupons and left them in the possession of the bank, they might properly presume that the company was not paying the coupons. Inasmuch as the

[1] Haven *v.* Grand Junction R. R. & Depot Co. 109 Mass. 88.

holders of the coupons received from the corporation no checks upon the bank, they must have known that the bank had no vouchers for its payments unless the coupons continued in force after the bank received them; and hence it is regarded as a fair presumption, that, when they delivered the possession, they assented to a transfer of ownership.[1] "Interest coupons," says Mr. Justice Strong, delivering the judgment of the Supreme Court of the United States, "are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intended to extinguish the coupons when he hands over the sum called for by them and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another without receiving any benefit from his act. We cannot close our eyes to things that are of daily occurrence. It is within common knowledge that interest coupons, alike those that are not due and those that are due, are passed from hand to hand, the receiver paying the amount they call for without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases, coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive, and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men."

[1] Ketchum *v.* Duncan, 96 U. S. 659. This case is clearly distinguished from cases like those in the preceding section, where the coupons were paid at the company's office, or with money advanced to the company for the purpose. Yet four of the justices of the court dissented, on the ground that the holders had no thought of selling the coupons, and therefore in law did not sell them. The decision of the court is, however, regarded as sound.

IV. *Interest on Overdue Coupons and Bonds.*

332. Interest is recoverable upon coupons after their maturity by way of damages for the detention of money due, and should be computed at the lawful rate without semi-annual or other rests.[1] Such interest will be computed only at the legal rate, even where the rate of interest on the bonds themselves after maturity continues at a higher rate which the parties are allowed under the statutes to contract for, the statutory rate applying only in the absence of a different stipulated rate.[2]

A bond payable at a fixed time and place on the surrender of the bond bears interest from its maturity, although no demand of payment, or offer to surrender the bond, be made.[3] This principle has been long established, though there is some difference of opinion whether the interest follows as a part of the contract, by the recognized rule appertaining to the breach of a written promise to pay a named sum at a fixed period, or as compensation, in the way of damages, for the detention of the debt. If a bond be made payable on demand at a particular place, no default of payment could be averred without a compliance with the condition precedent of making demand; and consequently there can be no recovery of interest except from the time of a demand.[4]

The owner of lost coupons is entitled, upon tendering indemnity, to recover the amount of them, with interest from the date of demand and tender of indemnity.[5]

Interest upon the coupons of the Chesapeake and Ohio Canal

[1] Town of Genoa *v.* Woodruff, 92 U. S. 502; Aurora City *v.* West, 7 Wall. 82, 105; Cromwell *v.* County of Sac, 96 U. S. 51; Hollingsworth *v.* City of Detroit, 3 McLean, 472; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Ashuelot R. R. Co. *v.* Elliot, 57 N. H. 397; Langston *v.* So. Carolina R. R. Co. 2 S. C. 248; County of Beaver *v.* Armstrong, 44 Pa. St. 63; Virginia *v.* Chesapeake & Ohio Canal Co. 32 Md. 501; North Pennsylvania R. R. Co. *v.* Adams, 54 Pa. St. 94; Mills *v.* Town of Jefferson, 20 Wis. 50; Arents *v.* Commonwealth, 18 Gratt. (Va.) 750, 776; Burroughs *v.* Commissioners of Richmond County, 65 N. C. 234; Connecticut Mut. Life Ins. Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co. 41 Barb. (N. Y.) 9; *S. C.* 26 How. Pr. 225; McLendon *v.* Com'rs of Anson County, 71 N. C. 38.

[2] Cromwell *v.* County of Sac, 96 U. S. 51, 62.

[3] Langston *v.* So. Carolina R. R. Co. 2 S. C. 248; Spencer *v.* Pierce, 5 R. I. 63.

[4] Aurora City *v.* West, 7 Wall. 82, 105; Gelpcke *v.* City of Dubuque, 1 Wall. 175, 206; Corcoran *v.* Chesapeake & Ohio Canal Co. 1 McArthur (D. C.), 358; Whitaker *v.* Hartford, Providence & Fishkill R. R. Co. 8 R. I. 47.

[5] Fitchett *v.* North Pa. R. R. Co. 5 Phila. (Pa.) 132.

Company was not allowed as against the State of Maryland, which, having a prior lien upon the property, waived it in favor of the bonds, "so as to make the said bonds and the interest to accrue thereon preferred and absolute liens," until the bonds and interest should be fully paid. This waiver was construed to extend only to the principal and interest of the bonds, so that interest on the overdue coupons could not be paid until the lien of the state had been satisfied.[1]

333. **In like manner where, by the terms of the mortgage, bonds to a certain amount are to be called or drawn** for redemption semi-annually, and to be paid from a sinking fund before the time fixed for the final redemption of the mortgage, if bonds are drawn and remain unredeemed through failure of the mortgagor to provide funds, interest continues to run upon these bonds up to the time of their payment. And where, in such a case, default having been made, the trustees took possession and afterwards had funds, out of which they proposed to pay interest only on the undrawn bonds, they were enjoined from so doing, and directed to apply the funds in the first place in payment of interest, *pari passu*, on undrawn bonds, and on drawn bonds which remained unpaid through the failure of the borrowers to provide funds.[2]

334. **If a corporation has no funds at the place** at which the coupons of its bonds are to be presented for payment, interest is payable on the coupons after maturity without presentation. To make available a defence of readiness to pay the coupons at the time and place they were payable, it must be alleged, and inasmuch as such a plea is affirmative, it casts the burden of proof upon the defendant.[3] If, however, the corporation has money at the time and place fixed for the payment of its coupons sufficient to pay them and all other maturing obligations, it is not necessary for the company, in order to escape after-accruing interest, to show that the money for the payment of its coupons was kept separate from the other funds of the company.[4]

[1] Corcoran *v.* Chesapeake & Ohio Canal Co. 1 McArthur (D. C.), 358.

[2] Gordillo *v.* Weguelin, L. R. 5 Ch. D. 287.

[3] North Pennsylvania R. R. Co. *v.* Adams, 54 Pa. St. 94.

[4] Emlen *v.* Lehigh Coal & Navigation Co. 47 Pa. St. 76.

It is not necessary to present a coupon for payment at a place named as a condition precedent to a recovery of judgment upon it against the maker.[1]

Coupons payable at a particular office are like notes payable at a specified bank, and import that the debtor will have a deposit at the time and place specified to pay them with. Unless it be shown that a fund was so provided, it is no defence to allege a want of demand.[2] In North Carolina, contrary to the general rule, it is held that in an action against the board of commissioners of a county, a demand is necessary, not to fix the liability, but simply to give notice of the liability, and an opportunity to pay without suit.[3]

A demand of payment of interest due upon bonds at the place where they are made payable by the holder is sufficient without any demand by the trustee.[4]

335. **A corporation is not bound to seek its creditors in a foreign country,** unless it has agreed so to do; and therefore a foreign bondholder, or a resident bondholder who is absent from the country, cannot compel the company to pay interest on overdue coupons, or upon the loan after it has fallen due, in the absence of all proof of inability or want of readiness to pay them at the time and place they were made payable.[5]

336. **The rate of interest recoverable after maturity,** where the statutes allow the parties to agree upon any rate, upon a bond not providing for the rate after the debt becomes due, according to some authorities is that fixed by law for cases where the parties have not agreed upon a rate, although the rate which the bond bears upon its face before maturity be either higher or lower than the legal rate.[6] But a different rule has been declared by some courts, and the weight of authority supports the rule that the rate

[1] Smith *v.* Tallapoosa County, 2 Woods, 574.

[2] Philadelphia & Baltimore Central R. R. Co. *v.* Johnson, 54 Pa. St. 127.

[3] Alexander *v.* Com'rs of McDowell, 67 N. C. 330; McLendon *v.* Com'rs of Anson County, 71 N. C. 38.

[4] Taber *v.* Cincinnati, Logansport & Chicago Ry. Co. 15 Ind. 459.

[5] Emlen *v.* Lehigh Coal & Navigation Co. 47 Pa. St. 76.

[6] Brewster *v.* Wakefield, 22 How. 118; Langston *v.* S. Carolina R. R. Co. 2 S. C. 248; Virginia *v.* Chesapeake & Ohio Canal Co. 32 Md. 501; Lash *v.* Lambert, 15 Minn. 416; Searle *v.* Adams, 3 Kans. 515; Pearce *v.* Hennessy, 10 R. I. 223.

of interest stipulated in the bond attends the contract until it is merged in judgment.[1] It is doubtful whether the Supreme Court of the United States would now follow the case of *Brewster* v. *Wakefield*, under like circumstances, although there is a clear distinction between that and the later case of *Cromwell* v. *County of Sac*. The former case arose under a statute of the Territory of Minnesota, which allowed parties to agree upon any rate of interest, and prescribed seven per cent. in the absence of such agreement. The court, bound by no adjudication of the territorial court and looking with disfavor upon the exorbitant interest stipulated for in that case, gave a strict construction to the contract of the parties, saying: "When a party desires to extort, from the necessities of a borrower, more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written in plain and unambiguous terms; for with such a claim he must stand on his bond." The case of *Cromwell* v. *County of Sac* arose under a statute which fixed the legal rate of interest at six per cent., but allowed parties to agree in writing for a rate not exceeding ten per cent., and provided that a judgment upon the contract shall bear the same rate. The bonds in question bore interest at the rate of ten per cent., and the court held that they drew the same rate after maturity. In this decision the Supreme Court followed the adjudications of the state courts. The argument also was conclusive that as a judgment in case of a stipulated interest must bear the same rate, it could not have been intended that a different rate should be allowed between the maturity of the contract and the entry of the judgment. Moreover, the limitation of ten per cent., within which the parties may agree for interest, relieves the court from sanctioning an extravagant and unreasonable agreement for interest.

The doctrine of the English decisions is, that after the maturity of a mortgage or mortgage bond, when the money for the payment of the debt has not been provided for at the place of payment, interest will run on at the old rate up to the time of redemption. What is paid for interest after maturity may be technically called

[1] Brannon *v.* Hursell, 112 Mass. 63; Cromwell *v.* County of Sac, 96 U. S. 51; Beckwith *v.* Hartford, Providence & Fishkill R. R. 29 Conn. 268; Marietta Iron Works *v.* Lottimer, 25 Ohio St. 621; Etnyre *v.* McDaniel, 28 Ill. 201; Pruyn *v.* City of Milwaukee, 18 Wis. 367; Hand *v.* Armstrong, 18 Iowa, 324; Kohler *v.* Smith, 2 Cal. 597; McLane *v.* Abrams, 2 Nev. 199; Hopkins *v.* Crittenden, 10 Tex. 189.

damages, but it is damages of a peculiar kind, for it would not be left to a jury to regulate their amount; the jury would be directed as a matter of law to find damages of the same amount as the interest, which would have been payable if the covenant had extended over this period.[1] There may, perhaps, be an exception to this rule when the agreed rate of interest is excessive and extraordinary; and when the court would adopt the statute rate of interest after maturity, as damages for the breach of the condition.[2]

V. *Suits upon Coupons.*

337. A holder of negotiable coupons may sue and recover upon them without producing or being interested in the bonds from which they were detached.[3] The declaration need not recite the bond from which the coupons were cut, though it is proper in some cases to show the relation which the coupons originally bore to the bond.[4] Several coupons may be declared upon in a single count, distinguishing them by a reference to the numbers of the bonds to which they belonged.[5]

Neither does it make any difference that the bond itself has been paid, when demand is made or suit commenced upon a negotiable coupon in the usual form detached from it. When the coupon is detached from the bond it loses its character as a mere incident to the bond, and becomes an independent claim, and therefore the payment of the bond could have no effect upon the coupon previously detached. The action is not upon the bond, but upon the coupon as separated from the bond. A special count of a declaration setting forth the bond by way of inducement, but founding the cause of action upon a coupon, and averring that it had been detached before the bond was paid and that it was subsequently presented for payment, and payment refused, is not, probably, open to objection; but at any rate a general count in debt is not.[6] It may sometimes be necessary to resort to

[1] Gordillo *v.* Wegnelin, L. R. 5 Ch. D. 287, per Amphlett, J.; Morgan *v.* Jones, 8 Ex. 620; Price *v.* Great Western Ry. Co. 16 M. & W. 244.

[2] Cook *v.* Wood, L. R. 7 H. L. 27.

[3] Thomson *v.* Lee County, 3 Wall. 327; City *v.* Lamson, 9 Wall. 477.

[4] City *v.* Lamson, 9 Wall. 477; Ring *v.* County of Johnson, 6 Iowa, 265. In Maine it is provided by statute that when coupons for interest are issued with bonds, and, for a valuable consideration, are detached and assigned by delivery, the assignee may maintain assumpsit upon them in his own name against the corporation engaging to pay them. R. S. 1871, p. 454.

[5] New London City National Bank *v.* Ware River R. R. Co. 41 Conn. 542.

[6] Thomson *v.* Lee County, 3 Wall. 327; Spooner *v.* Holmes, 102 Mass. 303; 3 Am.

the bond to prove the execution of the coupon; but when it contains a promise of payment to bearer, it is an independent negotiable instrument, and the cancellation of the bond has no effect upon it.

But in a suit upon coupons of municipal bonds which could be issued only by virtue of legislative authority, that authority should appear either by distinct averment of the specific act conferring it, or by stating the recital of the bond in that respect. The coupons, though detached, are related to the bonds to which they originally belonged, and by way of inducement or recital this relation ought to appear on the face of the declaration or petition.[1] It is not necessary, however, to set out the vote orelection provided for under the statute preliminary to the issuing of the bonds and coupons.[2]

338. **Coupons which contain no negotiable words**, nor any language from which it can be inferred that the intention was to make them negotiable, cannot be enforced in the name of an assignee.[3] Such coupons can be enforced only in the name of the bondholder. He would be bound to enforce the coupons in behalf of the person to whom he had thereby transferred a portion of his interest in the bond; but the nature of the contract as a mere right of action is not changed by the transfer.[4]

A coupon which is not negotiable is equally a part of the mortgage debt, and an assignment of it carries with it by implication an interest in the mortgage security; only the assignee would be obliged to seek payment of it in the name of the person to whom it was issued.[5]

An interest warrant which does not import a promise, but is a mere acknowledgment of indebtedness for interest on the bond itself, cannot generally be made the ground of an action.[6] When

R. 491; National Exchange Bank *v.* Hartford, Providence & Fishkill R. R. Co. 8 R. I. 375; Miller *v.* Town of Berlin, 13 Blatchf. 245, 250; Cooper *v.* Town of Thompson, Ib. 434, 438.

[1] City *v.* Lamson, 9 Wall. 477; Kennard *v.* Cass County, 3 Dill. 147; Thayer *v.* Mont-gomery County, 3 Dill. 389. See, however, Ring *v.* County of Johnson, 6 Iowa, 265.

[2] See §§ 287–299, of ch. vii.; Underhill *v.* Trustees of the City of Sonora, 17 Cal. 172.

[3] Jackson *v.* York & Cumberland R. R. Co. 48 Me. 147.

[4] Wright *v.* Ohio & Miss. R. R. Co. 1 Dis. (Ohio) 465.

[5] Sewall *v.* Brainerd, 38 Vt. 364.

[6] Crosby *v.* New London, Willimantic & Palmer R. R. Co. 26 Conn. 121. The interest warrant was in the following form: "Interest Warrant. Mortgage and

the right of interest is founded upon the bond itself, the declaration should be specially upon that. Thus, if the bond be made payable to bearer, with semi-annual interest thereon payable at the office of the company on delivery of certain interest warrants annexed, which imply no promise of payment in themselves, no one but the holder of the bond can maintain an action for the interest. The form of the instruments shows that the interest warrants were not intended to be additional or collateral promises or securities for the payment of interest, but that they were devised only as convenient and safe vouchers, furnishing the company evidence of payment, and for the bondholder, superseding the necessity or trouble of presenting the bond itself for the payment of the interest due upon it.

An interest coupon, or warrant in the form of an order, doubtless imports a promise, and of itself is a ground of action.[1]

339. When by the terms of a mortgage the coupons are payable only from the net revenues of the company, in a suit upon them it is necessary to allege and prove the existence of such revenues before there can be any recovery. Unless revenue comes into the treasury of the company the bondholders cannot claim its appropriation to the payment of the coupons. A demand for payment when, without the company's fault, there are no revenues on hand to meet the coupons, is premature, and properly refused; therefore in such case interest is not recoverable upon the coupons from the time of such demand; but only from a demand when there are such revenues and an unjust refusal.[2]

340. The plea of the Statute of Limitations is not a good defence to an action upon coupons, when it would not be a good defence to the bonds from which they were cut. They are but repetitions, as respects the interest payable at stated times, of the contract which the bond itself makes on that subject, and are a device for the convenience of the holder in the way of collecting the interest. They do not change the nature of the security

Convertible Bond. For thirty dollars, being half yearly interest on Bond No. 30 of the New London, Willimantic, and Palmer Railroad Corporation, payable on the first day of February, 1856. John Dickinson, Treasurer. $30."

[1] Town of Queensbury *v.* Culver, 19 Wall. 83.

[2] Corcoran *v.* Chesapeake & Ohio Canal Co. 1 McArthur (D. C.), 358.

given by the bond for the interest. There is really but one contract for the payment of interest, and that is contained in the bond. When the coupons are cut off, they still partake of the security of the bond.[1]

But the statute begins to run against actions upon coupons for interest from the time of their maturity, when they have been detached from the bonds and transferred to others than the holders of the bonds. The coupons themselves give a right of action without the bond, and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon them, while a complete right of action upon them exists in the holder. Therefore where a Statute of Limitations extends the same limitation to actions upon all written contracts, sealed or unsealed, it begins to run against coupons from their maturity, so that in such case an action upon the coupons would become barred before an action upon the bonds themselves maturing at a later date would be barred.[2] Referring to the previous decisions by the Supreme Court of the United States upon this point, Mr. Justice Field said: "It was not the intention of the court to decide that an action upon a coupon detached from the bond, and negotiated to other parties, was not subject to the same limitations as an action upon the bond itself; much less to hold that the coupons remained a valid and existing cause of action, not only for the period prescribed for actions on the bond after its maturity, but for the additional period intervening between the maturity of the coupon and the maturity of the bond, however great that might be. The question before the court in those cases was only whether the time the statute had to run against the coupons was the longest or shortest period; — was it six or twenty years in the Wisconsin case, or was it five or fifteen years in the Kentucky case; — and the court held that the statute ran for the longest period, because the coupons partook of the nature of the bonds and the statute ran for that period as to them."

A similar case arose under the Statute of Limitations of Kentucky, which prescribed fifteen years as the limitation for actions upon bonds, and only five years for actions on simple contracts. The action was upon coupons of certain bonds issued by the city of Lexington, and the city set up the statute of limitations of five

[1] City *v.* Lamson, 9 Wall. 477.

[2] Clark *v.* Iowa City, 20 Wall. 583, 588.

years in defence; but the Supreme Court of the United States answered that bonds are specialties not falling within the period prescribed; that suits on the bonds might be maintained if commenced within fifteen years after the cause of action accrued; and that a suit on a coupon is not barred by the statute unless the lapse of time be sufficient to bar also a suit upon the bond, as the coupon is but a repetition of the bond in respect to the interest for the period of time therein mentioned, and partakes of its nature.[1]

[1] City of Lexington *v.* Butler, 14 Wall. 282; McCoy *v.* Washington Co. 3 Wall. Jun. 381.

CHAPTER X.

CONTRACTS OF GUARANTY AND INDORSEMENT.

I. Nature of the contracts of guaranty and indorsement, 341–349.

II. Corporations cannot enter into the contract without legislative authority, 350–356.

Nature of the Contracts of Guaranty and Indorsement.

341. **The contract of a guarantor is collateral, secondary, and contingent.** — It binds him to pay the debt guaranteed, if by the exercise of due diligence it cannot be collected from the principal debtor. The contract of a surety is on the other hand direct, and makes him responsible at once upon the default of the principal debtor. The contract of an indorser of a negotiable instrument is different from either. He undertakes to pay the obligation, in case of its dishonor, if it is duly presented for payment to the maker at maturity, and due notice is given to him of its dishonor, but not otherwise. His contract differs from that of a guarantor chiefly in the matter of making demand upon the maker and giving notice of dishonor; for while punctual presentment and punctual notice of non-payment are requisite to charge an indorser, in the case of a guarantor presentment and notice within a reasonable time is all that is required, and this reasonable time is ordinarily determined by the inquiry whether, by reason of delay, the guarantor has sustained any loss or injury.

342. **Under a guaranty of a coupon bond the degree of diligence required of the holder of a coupon is to be ascertained** by reference to the relation of the parties, and to the injury sustained by the guarantor from the delay. This point was well considered in a suit against the State of Virginia upon its guaranty of the negotiable bonds of the city of Wheeling, issued to pay the city's subscription to the stock of the Baltimore and Ohio Railroad Company. A number of coupons for interest due upon these bonds for the years 1862, 1863, and for January, 1864, were

stolen from the state, and in November of the latter year were bought in Richmond by one who paid full value for them without knowledge that they had been stolen. After the close of the civil war, in 1865, the purchaser presented them for payment at the banking house in New York where they were made payable, and also to the city of Wheeling; but payment being refused, he brought suit against the State of Virginia upon its guaranty. The city of Wheeling was ready to pay the coupons whenever the question of their ownership should be determined. The Court of Appeals of Virginia held that the state was not liable upon its guaranty of these coupons by reason of the delay in presenting them for payment.[1] Mr. Justice Joynes, delivering the opinion of the majority, said: "The state has a right to claim that they shall be presented for payment within a reasonable time after they become payable, so that it may be relieved from its liability as guarantor; and the coupons on their face give notice of the guaranty. It cannot be supposed that the state would be willing to incur a responsibility wholly indefinite, in point of time, which would be the case if the coupons were designed to circulate, without any limit, after the day of payment. It is no answer to say that the city of Wheeling has provided by a mortgage for the indemnity of the state. The security may be lost, or its value impaired by delay; and the state, by accepting that security, did not abandon the character of guarantor and assume that of principal debtor."

343. A guaranty of bonds without other designation implies a guaranty of the principal sum, and of its incident, the interest.[2]

A city having issued bonds to a gas company, under an ordinance providing that the company should "guarantee the said bonds, and assume the payment of the principal thereof at maturity," it was held that the ordinance contemplated two undertakings by the company: one to the bondholder to answer for the city's liability; the other to the city to pay the bonds at their maturity. The indorsement of the president of the company on the bonds, guaranteeing "the payment of the principal and interest thereof," was a substantial compliance with the ordinance.[3]

[1] Arents *v.* Commonwealth, 18 Gratt. (Va.) 750, 775.

[2] New Orleans *v.* Clark, 95 U. S. 644.

[3] Jefferson City Gas Light Co. *v.* Clark, Sup. Ct. of the U. S. Oct. T. 1877.

It is a sufficient consideration for a guaranty by one railroad company, of the payment of the interest coupons of another company, that an arrangement has been entered into between the roads to secure a uniform gauge, and thus increase the business of each.[1]

344. **The principal creditor is in equity entitled to the benefit of bonds of a corporation received by a surety,** or by a person standing in the position of a surety, for his indemnity, and to discharge the debt he is liable for; and it makes no difference that the principal creditor did not know of this at the time, or give credit on the faith of it.[2]

A guarantor having paid a part only of the debt of the principal debtor for which the guaranty was given, cannot claim reimbursement out of the funds of such debtor as against the common creditor until the latter is fully satisfied.[3]

A guarantor of railroad bonds who has paid the debt is entitled as a creditor to the benefit of a statute authorizing the appointment of a receiver of an insolvent railroad, canal, or turnpike company, upon the application of a creditor, and a sale or lease of the property.[4]

345. **A contract of guaranty of a coupon bond transferable by delivery is itself in effect negotiable** at law with the bond or coupons; for if not actually negotiable through the negotiability of the bond and coupons, it is assignable with them in equity, and an interest in it passes in equity to each successive holder of the bond or coupons. It is the manifest intention of the parties that the right to enforce the guaranty shall be coextensive with the right to enforce the payment of the debt. The guaranty, as an accessory to the bond or coupon, follows it and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon. Whoever is entitled to enforce the bond or coupon is entitled to enforce the guaranty, and cannot be defeated by any equities that do not affect his claim upon these primary demands.[5]

[1] Connecticut Mut. Life Ins. Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co. 41 Barb. (N. Y.) 9.

[2] Rice's Appeal, 79 Pa. St. 168.

[3] Virginia *v.* Chesapeake & Ohio Canal Co. 32 Md. 501.

[4] Pennsylvania R. Co. *v.* Pemberton & N. Y. R. R. Co. 28 N. J. Eq. 338.

[5] Arents *v.* Commonwealth, 18 Gratt. (Va.) 750; Blakely Ordnance Co. *in re*, L. R. 3 Ch. App. 154; Agra & Masterman's Bank *in re*, L. R. 2 Ch. App. 397.

346. A guaranty is not provable in bankruptcy or in schemes of liquidation without express provision, until the liability becomes absolute by the failure of the principal debtor to pay the obligation at maturity according to its terms. Until the liability becomes absolute, there is no way in law or in equity by which persons holding a guaranty can secure himself out of the property of the guarantor. Neither is the holder of bonds guaranteed by a corporation entitled to share as a creditor in a scheme of reorganization entered into upon the insolvency of the corporation, under which provision is made for the participation only of creditors holding existing liabilities of the corporation. Thus, the Eastern Railroad Company of Massachusetts, having become greatly embarrassed, and practically insolvent, a statute was enacted for its relief, and the securing of its debts and liabilities.[1] This act authorized the corporation, by a mortgage of all its property to trustees, to secure an extension of its debts for a period of thirty years at a reduced rate of interest. The existence of the corporation was preserved, but the stockholders had only the ultimate chance of redeeming the property. A leading purpose of the act was to give to all its actual creditors, without regard to the nature of their claims, an equal participation in the mortgage security. The owners of certain bonds of another railroad company, indorsed and guaranteed by the Eastern Railroad Company, claimed the right to participate in the benefits of this mortgage. The guaranteed bonds had not fallen due, and there had been no default in the payment of the interest upon them. The holders of the guaranteed bonds did not, therefore, claim immediate participation, but asked to have certificates of indebtedness set aside to an amount sufficient to secure the guaranty of the bonds, and in default of the payment of the interest or principal of the bonds, they claimed the right to receive the interest on such certificates, and to share in the security. But the court denied the claim upon the ground that no provision was made for contingent claims.[2]

347. In the recent case of the Eastern Railroad Company *v.* Rogers, before the Supreme Court of Massachusetts,[3] the holders

[1] Acts 1876, ch. 236.

[2] Merchants' Nat. Bank *v.* Eastern R. R. Co. 124 Mass. 518.

[3] 124 Mass. 527.

of the bonds of a leased road guaranteed by that company sought to add to the value and obligation of a common guaranty a trust to retain and hold the earnings of the leased road for the payment of the interest on the guaranteed bonds. The Eastern Railroad Company in New Hampshire leased its road for a long term of years to the Eastern Railroad Company of Massachusetts. Subsequently the Portsmouth, Great Falls, and Conway Railroad Company became a party to the agreement. The scheme of the three companies, as stated by Judge Morton, in delivering the opinion of the court, seems to have been to form a single or consolidated line of railroads so far as they could without violating the laws of the states in which they were respectively incorporated. The Portsmouth, Great Falls, and Conway Railroad Company was to complete its road and appurtenances out of its capital stock or otherwise, at its own cost and expense. After it was completed the Eastern Railroad Company was to manage the three roads and to pay out of the net earnings of the consolidated line dividends to the stockholders of the several roads *pari passu*, and these dividends were to be in lieu of and in full for the rent of the leased roads.

After the agreements were made, it was found that the Portsmouth, Great Falls, and Conway Railroad Company was not able to perform its contract and to construct and complete its railroad from its capital stock or other resources. To enable it to do so, it borrowed of the Eastern Railroad Company a large sum of money. A part of the sum so borrowed was repaid by issues of stock. The balance, amounting to one million dollars, was repaid by issuing to the Eastern Railroad Company bonds of the Portsmouth, Great Falls, and Conway Railroad Company, payable in 1892, with interest at the rate of seven per cent. payable semi-annually. The Eastern Railroad Company negotiated and sold a part of these bonds, and pledged others of them, guaranteeing their payment. The holders of the bonds now claimed that they were entitled to have the interest on them as it accrues paid out of the earnings of the road in priority of the other creditors. They based their claim upon a provision of the lease that out of the gross amount of the tolls and income of the railroads there should be deducted and paid all charges and expenses of the lessee company in maintaining and operating the roads, taxes, rents, repairs, wages, damages being enumerated with other things, "and gener-

ally all charges that may be incurred in the management of the business or concerns of the said railroads, or any part thereof, and all incidental charges and expenses, and the interest that may accrue on any past or future loans."

Upon the subsequent insolvency of the Eastern Railroad Company and the adoption of the legislation before referred to for its relief, the holders of the guaranteed bonds claimed that either the Eastern Railroad Company took the earnings of the Portsmouth, Great Falls, and Conway Railroad charged with a trust to pay the interest on their bonds, or that the interest on these bonds is to be regarded as in the nature of rentals or operating expenses. The court in reply say: "We cannot concur in this view of the purpose or effect of the article. As we have before said, it was contemplated as a part of the arrangement between the parties that the Eastern Railroad Company should, as rent or in lieu of rent of the leased roads, pay to their stockholders, *pari passu* with its own stockholders, dividends out of the net earnings of the three roads. It was natural and almost necessary, in order to avoid future misunderstanding and litigation, that the contracts should contain provisions as to the mode of determining what should be deemed to be net earnings. We think this was the purpose of the fourth article, and that it was intended for the direction and protection of the Eastern Railroad Company, and not to enlarge its liabilities. It contains no words of covenant or promise on the part of the Eastern Railroad Company. It provides merely that 'from and out of the gross amount of the tolls and income of the railroads owned by the said parties hereto respectively shall be deducted and paid from time to time' the charges, expenses, and payments enumerated, including 'the interest that may accrue on any past or future loans.' By this was meant the interest which the Eastern Railroad Company might pay upon its loans. To hold that it was intended as a covenant that it would pay the interest on any money which the lessor might borrow would be inconsistent with the previous stipulations of the contract, by which the lessor agreed to complete the road at its own cost and expense, and by which the only rent to be paid by the lessee was in the form of dividends. No language is used in this article which purports to create any new liability of the Eastern Railroad Company. It enumerates various charges and expenses which the company may incur in the management of the roads,

but its liability to pay those charges and expenses is not created by this article, but out of other independent contracts or duties."

For these plain and sufficient reasons the court necessarily held that the holders of the guaranteed bonds of the Portsmouth, Great Falls, and Conway Railroad Company had no claim upon the earnings of the Eastern Railroad Company; that the latter company was primarily liable to pay the bonds and the interest as it accrues; that the only liability of the Eastern Railroad Company was a contingent and a collateral liability, arising from its contract of guaranty. It followed that it was not the duty or the right of the Eastern Railroad Company to apply the earnings of its railroad to the payment of the interest on the bonds of the Portsmouth, Great Falls, and Conway Railroad Company, as it might from time to time accrue and become due.

348. Indorsement of a bond. — A railroad company which has transferred, by indorsement, a negotiable bond issued by a municipal corporation, is bound as an indorser of negotiable paper, if its liability be fixed by a proper demand and notice. It has been suggested that such a liability is not fairly in the contemplation of the parties to an indorsement of a bond which may have twenty or even forty years to run; but whatever force this view might have in case of an indorsement of such an instrument by an individual, it has none in case of a corporation, which does not die.[1]

349. A bona fide holder may presume that an indorsement is regular. — The indorsement by the State of Alabama of the bonds of the Montgomery and Eufaula Railroad Company was claimed to be void, because the statute authorized the indorsement of first bonds only, while, as it was alleged, there was a prior mortgage upon the company's property, and the bonds could not, therefore, be first mortgage bonds. "Let us concede," said Judge Woods, of the Circuit Court of the United States,[2] "what defendants claim, that there was a prior mortgage on the road at the date of these bonds. Were the holders of the bonds under the necessity of taking notice of that fact, and does the fact make the bonds void in the hands of a *bonâ fide* holder for value? If the governor was without any authority to indorse any bonds, his in-

[1] Bonner *v.* City of New Orleans, 2 Woods, 135.

[2] Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606.

dorsement would be void. If the law authorized him to indorse the bonds of the A. and C. railroad, and he undertook to indorse the bonds of the South and North Alabama Railroad, his indorsement would be void. But in this case there is no dispute that the law authorized him to indorse the bonds of the Montgomery and Eufaula Railroad, on the conditions that there should be completed and equipped twenty miles of road before any indorsement, and that the indorsement should not exceed $16,000 per mile of completed railroad, and that the bonds indorsed should be first mortgage bonds. The authority of the governor to indorse such bonds on such conditions is not disputed. Now, suppose the governor indorses such bonds of a railroad company before twenty miles of its road are completed and equipped, or indorses the bonds at a rate greater than $16,000 per mile, are the bonds on that account void in the hands of a *bonâ fide* holder? The unbroken authority of cases decided by the Supreme Court of the United States is to the effect that such bonds are valid.[1] . . . . But do these authorities cover the case where an indorsement is authorized of first mortgage bonds, and the governor indorses bonds of a railroad company whose property is subject to a prior mortgage? After some hesitation I have come to the conclusion that they do. . . . . The legal authority to make the indorsement is sufficiently comprehensive to include the indorsement of the bonds in question; and the governor having placed his indorsement upon the bonds, and certified in the indorsement itself that it was made in pursuance of the act of the legislature, I think a *bonâ fide* holder has the right to presume that all precedent requirements have been complied with, and that there are no prior liens upon the railroad; and, so far as he is concerned, this presumption cannot be rebutted."

II. *Corporations cannot enter into these Contracts without Legislative Authority.*

350. It is no part of the ordinary business of a railroad company or other corporation to undertake the payment of the debts of others;[2] and therefore, without legislative au-

[1] Citing Knox County *v.* Aspinwall, 21 How. 539; Mercer Co. *v.* Hacket, 1 Wall. 83; Meyer *v.* City of Muscatine, Ib. 384.

[2] Bank of Genesee *v.* Patchin Bank, 3 Kern. (N. Y.) 309; Smead *v.* Indianapolis, Pittsburg & Cleveland R. R. Co. 11 Ind. 104; Stark Bank *v.* United States Pottery Co. 34 Vt. 144; Madison Co. *v.* Water-

thority in this behalf, a corporation has no power to enter into the engagement of a guaranty or indorsement of the bonds or other negotiable instruments of another corporation, or of a person; or to enter into the more indirect engagement of guaranteeing the dividends of another company;[1] or of purchasing the stock of another company;[2] or of completing the line of a railroad company under an agreement to work the line;[3] or of aiding in the extension or improvement of another railroad company.[4]

Legislative authority to railroad and other corporations to enter into the contract of guaranty is most frequently given by special statute, although there are some general statutes for this purpose.[5]

Neither can corporations, according to the rule adopted in this country, purchase, hold, or deal in the stock of other corporations, unless expressly authorized to do so.[6]

Neither can a railroad company, without special authority guarantee a certain amount of dividends on its own stock, although such contract be made with a county as an inducement for the county to take stock in the company and pay for it with county bonds.[7]

351. To enable a railroad corporation to enter into a con-

town Co. 7 Wis. 59; Central Bank *v.* Empire Stone Dressing Co. 26 Barb. (N. Y.) 23; Bridgeport Bank *v.* Same, 30 Ib. 421; Farmers' Bank *v.* Same, 5 Bosw. (N. Y.) 275.

[1] Colman *v.* Eastern Ry. Co. 10 Beav. 1. See Logan *v.* Courtown, 13 Beav. 22.

[2] Mechanics', &c. Building Asso. *v.* Meriden Agency Co. 24 Conn. 159; Solomons *v.* Laing, 12 Beav. 339.

[3] Great Western Ry. Co. *v.* Preston & Berlin Ry. Co. 17 Upp. Can. Q. B. 477.

[4] East Anglian Rys. Co. *v.* Eastern Counties Ry. Co. 11 C. B. 775; McGregor *v.* Deal & Dover, &c. Ry. Co. 18 Q. B. 618.

[5] As in West Virginia, where any railroad or other private corporation, or joint stock company may, with the assent of the holders of two thirds of its stock, had by a vote at a stockholders' meeting, subscribe for or purchase the stock, bonds, or securities of any railroad company, whether incorporated by special charter or under the general railroad act; and may with like assent, become surety for, or guarantee the debts of such railroad company, or in any other manner aid such railroad company in the construction of its railroad or other works or improvements. Acts 1877, ch. 88; Acts 1872–3, ch. 88, § 40. In Massachusetts guaranties by railroad companies in certain cases are provided for. See § 45.

[6] Zabriskie *v.* Cleveland, Columbus & Cincinnati R. R. Co. 23 How. 381; White *v.* Syracuse & Utica R. R. Co. 14 Barb. (N. Y.) 559; Connecticut Mut. Ins. Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co. 41 Barb. (N. Y.) 9; Mayor *v.* Balt. & Ohio R. R. Co. 21 Md. 50; Mechanics', &c. Building Asso. *v.* Meriden Agency Co. 24 Conn. 159; Hodges *v.* New Eng. Screw Co. 1 R. I. 312, 322; Central R. R. Co. *v.* Collins, 40 Ga. 582.

[7] Pittsburg & Steubenville R. R. Co. *v.* Allegheny County, 79 Pa. St. 210.

tract of guaranty it is not necessary that the authority to do so should be expressly conferred by statute. Under the railroad act of California, which provided that such a corporation "shall be capable in law to make all contracts . . . . necessary for the construction, completion, and maintenance of such railroad; . . . . and generally shall possess all the powers and privileges, for the purpose of carrying on the business of the corporation, that private individuals and natural persons enjoy," [1] it was held that a railroad company might make a valid guaranty of the bonds of another corporation. The guaranty in this case was entered into as a part of a leasehold agreement whereby the California Pacific Railroad Company leased its road to the Central Pacific Railroad Company for a long term of years, and the latter company stipulated to guarantee the payment of $2,000,000 of the bonds of the lessor company, payable in thirty years. The court held that this stipulation was not *ultra vires*. The reasoning of the court was that a natural person might make such a contract, and therefore the exercise of this power by the corporation must be upheld, unless by its very nature it is a power which a corporation cannot exercise; but that there is no sufficient reason deducible from the character of a railroad company and its business, why it may not guarantee the payment of a debt which it might directly contract to pay.[2]

This decision does not seem to be supported by sound legal principles and reasoning. It has been vigorously criticised. A writer in the American Law Register,[3] with reference to the general power of a railroad corporation to make such a guaranty, says: "In the case of a lease by one railroad corporation to an-

[1] Stats. 1861, p. 608; and see to like effect Civil Code, § 354.

[2] Low *v.* California Pacific R. R. Co. 9 Am. Railw. R. 366; 4 C. L. J. 487. McKinstry, J., dissenting, said in reference to the clause of the statute relied upon as impliedly giving authority to make the guaranty: "This clause gives no additional primary powers to the corporation. It follows after the enumeration of certain powers specifically conferred, and is but declaratory of the rule that powers incidental to the express powers conferred may be employed by a corporation. It is a legislative enunciation of the rule always recognized by the courts, that the implied or incidental powers which may be exercised by a corporation shall be ascertained by reference to the case of an individual upon whom should be conferred limited powers like those granted to the corporation by its charter. If the claim quoted means more than this, what does it mean less than a grant to the corporation of every power which may be employed by an individual carrying on a private business for his personal emolument."

[3] Vol. 25, pp. 513, 518.

other railroad corporation, the lessee pays its own debt when it pays the rent, which it owes as rent, and which it has agreed to pay as rent; in the case of a guaranty by the lessee of the bonds of the lessor, should the guarantor be compelled to pay the bonds, principal or interest, or any part thereof, in pursuance of its contract of guaranty, it pays an indebtedness of the lessor company, and, consequently, may compel a reimbursement thereof. In the former case it pays as principal; in the latter, as surety. The former contract, however unwise it might be, the railroad company has the power (by statute) to make; and, consequently, may agree to pay the rent on the lease, the amount of the rent being simply a question of degree; the latter species of contract, it seems to us, it has not the power to make, there being no express statutory power to that effect, as it is in reality the loaning of the credit of the guarantor, — the guaranty of the debt of another. The contract of guaranty, *ex vi termini*, implies a loan of the credit of the guarantor." Neither is there any power to guarantee implied in the power to lease, nor is it appurtenant to the power to lease. The power to lease and the power to guarantee are as diverse as powers can well be. The statute confers on railroad corporations the powers of natural persons no further than is necessary "for the purpose of carrying on the business of the corporation." The business of a leased railroad may be carried on without the lessee's guaranteeing the bonds of the lessor, and therefore such guaranty is not necessary for the purpose contemplated by statute. If a railroad corporation is to possess all the powers of a natural person in the broadest acceptation of the term, wherein would be the use of legislation seeking to prescribe its powers?[1]

352. The right to enter into the contract may be implied from authority to aid another company. —A railroad company may guarantee the bonds of another railroad company under the authority of a general statute which authorizes railroad companies to aid other railroad companies by means of subscription to their capital stock or otherwise. If any acceptance of the statute by either of the corporations is necessary, this may be inferred in favor of persons holding guaranteed bonds from the fact that the companies have done the acts authorized by these statutes.[2]

[1] 25 Am Law Reg. 522.

[2] Zabriskie *v.* Cleveland, Columbus & Cincinnati R. R. Co. 23 How. 381.

353. A corporation may, as a matter of course, indorse negotiable instruments which it has taken in the course of business or in the payment of debts due it, without special authority to do so.[1] This would be true of corporations which have no power to make instruments such as it receives and indorses.[2] A corporation having the power to create negotiable paper has the same power to indorse it, whether such power be implied or conferred.[3] It is within the corporate powers of a railroad company to guarantee bonds taken and held by it in the usual course of its business.[4] But even if the guaranty be made for a purpose not authorized by the charter, as for instance for the accommodation of another road, a *bonâ fide* holder for value without notice is not affected by that fact.[5]

354. A railroad company having power to issue its own bonds may guarantee the bonds of municipal corporations issued in payment of subscriptions to the stock of the company. The obvious purpose and advantage of such a guaranty are to augment the credit of the bonds in the market, and to facilitate their sale, and the raising of money for the construction of its road.[6] It is, moreover, one of the recognized powers of a private corporation that it may borrow money, or become a party to negotiable paper in the transaction of its legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is, that its acts in that behalf were done in the regular course of its authorized business. In such case the corporation guarantees its own property, and not merely the debt of another.

355. A railroad company may be bound by consenting to

[1] Olcott *v.* Tioga R. R. Co. 27 N. Y. 546, 549, 561.

[2] Smith *v.* Johnson, 3 H. & N. 222.

[3] See Prescott *v.* Flinn, 9 Bing. 19, per Tindall, C. J.; Frye *v.* Tucker, 24 Ill. 180; Buckley *v.* Briggs, 30 Mo. 452; Hardy *v.* Merriweather, 14 Ind. 203.

[4] Madison & Indianapolis R. R. Co. *v.* Norwich Savings Soc. 24 Ind. 457.

[5] Madison & Indianapolis R. R. Co. *v.* Norwich Sav. Soc. *supra*. The court refer to Smead *v.* Indianapolis, Pittsburg & Cleveland R. R. Co. 11 Ind. 104, where it was attempted to draw a distinction between paper executed beyond the power and that executed within the power of the corporation, but by an abuse of the power in that particular instance, and declare that as applied to commercial paper, legal on its face, it is difficult to sustain such a distinction on any sound principle of law or reason.

[6] Railroad Co. *v.* Howard, 7 Wall. 392.

a representation of guaranty contained in the bonds of another company, as for instance that the former company had, in consideration of a lease to it of the road of such other company, guaranteed the payment of the interest on its bonds. The Pacific Railroad Company of Missouri was upon this ground held liable in an action brought directly against it by a holder of coupons due upon bonds issued by the St. Louis, Lawrence, and Denver Railroad Company.[1] The only promise made by the defendant company was one contained in a lease to it of the other railroad company, for an annual rental. The Pacific Railroad Company was interested in the construction and completion of the St. Louis, Lawrence, and Denver Road, and executed the lease in order to enable that company to negotiate its bonds and raise money to build the road, and the rental was appropriated specifically to the payment of the interest on such bonds. The bonds contained a statement that the payment of the interest was guaranteed by the Pacific Railroad of Missouri. In form, the St. Louis, Lawrence, and Denver Company furnished the consideration for the promise of the defendant company, rather than the bondholders. In reality, however, the bondholders furnished the means to build the road, the use of which, under the lease, constituted the consideration of the defendant's promise. The plaintiff, however, did not bring his suit upon the promise contained in the lease, but upon the implied promise contained in the representation in the bonds which the defendant company had caused to be issued in this form, or had consented to. "If this allegation can be proved," said Judge Dillon, "our opinion is that the defendant is bound to make good the guaranty, and that this guaranty attaches to, and follows the bonds, and is available to every holder of them who relied upon it. In this view the promise by the defendant is a direct one to whoever becomes the holder of bonds on the faith of it, and, although the facts are different, the case falls within the principle of morality, fair dealing, and enlightened justice asserted by the Supreme Court of the United States in the cases of *Lawrason* v. *Mason*,[2] *Woodruff* v. *Trapnall*,[3] *Curran* v. *Arkansas*,[4] *Furman* v. *Nicols*.[5] If the fore-

[1] Opdyke *v.* Pacific R. R. Co. 3 Dill. 55.

[2] 3 Cranch, 492; 2 Am. Lead. Cases, 334-362.

[3] 10 How. 190, 206.

[4] 15 How. 304

[5] 8 Wall. 44, 50.

going is a correct view of the legal relations and rights of the parties, it follows that the contract between the defendant and the plaintiff was complete when the plaintiff bought the bonds upon the strength of the promise or representation which the defendant authorized, as it is alleged, to be made, and that the plaintiff's rights are in no wise dependent upon whether the Lawrence Company kept its contract in respect to taxes, fences, &c., and could not be affected by a subsequent rescission of the contract, and surrender of the road by the defendant to the Lawrence Company."

356. When a corporation is estopped to claim that its indorsement or guaranty was ultra vires. — Although the indorsement by one railroad company of the bonds of another company be *ultra vires* as in violation of the rights of the stockholders, both the corporation as an entity and the stockholders as such, may be estopped from repudiating it, either by express ratification or by such acquiescence and enjoyment of the benefits of the contract as would make it a fraud to permit it to be set aside.[1] If the holders of the indorsed bonds can enforce them against the railroad company, individual stockholders cannot restrain the company from voluntarily discharging its liability. To show assent and acquiescence it is not necessary to prove the acquiescence of each individual stockholder. It is enough to show circumstances from which it may be reasonably inferred that the contract to be ratified was within the knowledge of all who chose to inquire, and the stockholders had full opportunity and means of inquiry.

A railroad company which has guaranteed the payment of the interest coupons of another road, and afterwards, upon coming into possession of the bonds, has sold and transferred a portion of them for value, is estopped to claim that the guaranty was *ultra vires*. The guaranty was additional security for the same debt evidenced by the bonds, and the guaranty passed with the bonds to the purchaser without special mention. Even if the guaranty was inoperative when it was made, because supported by no valid consideration, or made for no authorized purpose, it became operative when issued by the guarantor. The guaranty may then be

[1] Cozart *v.* Georgia R. R. & Banking Co. 54 Ga. 379.

treated as written at the time of the transfer, and as resting upon the consideration the npassing.[1]

When a railroad company has the general power to make a guaranty it is immaterial to a purchaser of the guaranteed securities whether its action in this respect be ratified by a vote of the stockholders, although such ratification is provided for by statute, if the provisions in this respect are intended for the protection of the shareholders, and relate chiefly to the mode or manner of the execution of the power. Holders of such coupons have the right to presume that the guarantors have done their duty, and have proceeded regularly in the execution of the power.[2]

[1] Arnot *v.* Erie Ry. Co. 67 N. Y. 315; aff. 5 Hun, 608.

[2] Connecticut Mut. Life Ins. Co. *v.* Cleveland, Columbus & Cincinnati R. R. Co. 41 Barb. (N. Y.) 9.

CHAPTER XI.

THE DUTIES AND RIGHTS OF MORTGAGE TRUSTEES.

I. Nature of the trust assumed by mortgage trustees, 357–362.
II. Effect of notice to mortgage trustees, 363, 364.
III. Rights of mortgage trustees in possession, 365–370.
IV. Removal of trustees and filling of vacancies, 371–374.
V. Statutory provisions regulating the duties of mortgage trustees, and the choosing of new trustees, 377–382.

I. *Nature of the Trust assumed by Mortgage Trustees.*

357. The nature and character of the trust assumed by one to whom a railroad mortgage is made for the benefit of bondholders depend not merely upon the express terms of the mortgage deed, but upon the implications which arise from the relations of the parties and the condition of the trust property. As these circumstances change from time to time, the obligations of the trustee change also. Immediately upon the execution of the deed, and so long as no active duty is demanded of the trustee, the trust is little more than nominal; it is what is termed a dry, naked trust. Generally the trustees have nothing to do with the negotiation of the bonds, and so long as the interest is promptly paid so that no forfeiture occurs, their office is silent. But when a forfeiture has occurred through the non-payment of the interest or principal secured, or through the breach of any other condition of the mortgage, new and important duties arise. The mortgage in terms generally requires the trustee to take possession of the mortgaged property and to sell it for the benefit of the bondholders. The fulfilment of these express trusts in behalf of the bondholders is the primary and most obvious duty of the trustee. But in the performance of these trusts, other trusts arise by implication in favor of others besides the bondholders, and particularly in favor of subsequent incumbrancers and the mortgagor. The duties of the trustees then become not only active, but responsible and delicate. They are then called upon to elect between delay

and action; between, on the one hand, taking possession of the road and its fixtures, and thereby assuming at once the vast public and private burdens and responsibilities of a great public work; and on the other, delay, and consequent complication and loss; or they must undertake the ulterior and final remedy of foreclosure.[1]

358. It is the duty of a mortgage trustee to protect the security he has taken for the bondholders to the utmost of his ability. It is hardly consistent that such trustee should at the same time occupy the position of construction agent of the company. It is at any rate fraudulent for such trustee to confederate with the company in disposing of a large amount of iron rails bought by the company for its use and embraced in the mortgage as after-acquired property. To warrant such a diversion of the property solemnly appropriated to the construction of the road and the security of the bondholders who advanced money to build it would at least require the proof of an urgent and clear necessity that could not be financially provided for in any other way.[2] The utmost good faith is required in transactions of this nature resulting in the sale of any portion of the mortgage property. If the trustee be remiss in his duty to protect the security, the bondholders may themselves maintain an action to prevent a diversion of the property.

For the same reason a mortgage trustee in possession of a railroad cannot make a valid contract for the leasing of the road to another railroad corporation in which he is a stockholder and director.[3]

359. The trustees have no power to assent for the bondholders that an unsecured debt may be paid in preference to their secured bonds. The fact that a floating debt of a railroad company has been contracted for the payment of interest on its bonds, and for supplies and repairs for the benefit of the company's property, gives the court no power without the consent of the bondholders to direct the application of the income of the road

[1] Sturges *v.* Knapp, 31 Vt. 1, 55, per Redfield, C. J.

[2] Weetjen *v.* St. Paul & Pacific R. R. Co. 4 Hun (N. Y.), 529.

[3] Ashuelot R. R. Co. *v.* Elliot, 57 N. H. 397.

to the payment of it, although the trustees of the bondholders in a suit to foreclose the mortgage apply for authority to make such payment, and it appears that such debt could be paid on favorable terms, and that the payment of it would be equitable, and probably for the interest of the bondholders in the way of facilitating their reorganization of the company.[1] The court said that these were doubtless strong considerations when addressed to the bondholders themselves. "But can this waive the rights of bondholders because we might think it would turn out to their advantage? Can we make a contract for them because we think it would be a good contract? Have we the power to take money which belongs to them and give it to others without their consent, because we think it would be for their interest? They have not consented to this diversion of their money, and no one who is authorized to do so has consented for them. For the trustees to undertake to give assent for the bondholders is clearly outside of their powers and duties, which are plainly prescribed in the deed of trust. This court is, in my judgment, without any power to make the decree recommended by the report of the master. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a court of equity, would shake the credit of railroad securities throughout the world."

360. **A mortgage trustee while in possession of a railroad under the mortgage is a trustee of the corporation,** as well as of the bondholders. It is inconsistent with the duties which such trustee owes to the corporation to deal in the bonds which the mortgage was given to secure for his own private gain. This doctrine of the trust obligations of a mortgage trustee while engaged in the active discharge of his trust is strongly brought out in the case of the *Ashuelot Railroad Company* v. *Elliot*, before the Supreme Court of New Hampshire.[2] While the defendant was the treasurer and clerk of the corporation, a mortgage of its road was executed to him as trustee, to secure the bonds of the company. For ten years afterwards the corporation remained in possession of the mortgaged property, and the defendant continued to act as its clerk and treasurer. So long as the interest on the bonds was

[1] Duncan *v.* Mobile & Ohio R. R. Co. 2 Woods, 512.

[2] 57 N. H. 397.

paid there was no breach of condition, and nothing for him to do in the way of an active performance of any trust under the mortgage. Thus far, of course, it was a dry and naked trust. But the bonds not being paid at maturity, it thereupon became, by the terms of the mortgage, the right and duty of the trustee to enter and hold possession of the property for the purpose of realizing upon the security and enforcing payment of the debt. He did this, and soon after an act of the legislature was obtained, which it was supposed on all hands had the effect to foreclose the mortgage, and to invest the bondholders with the absolute ownership of the road and franchise, with the substantial attributes of a corporation. The conduct of the trustee in the management of the property was based upon this supposition for ten years and more, until the Supreme Court of the state held that the statute was ineffectual to foreclose the mortgage; but the legal result of this decision was that the defendant during all this time had been in possession, not as the agent of the absolute owners of the road, but as the trustee of the bondholders under and by virtue of the mortgage. During this period he had purchased from time to time, at their market price, bonds secured by this mortgage to the amount of $46,000; and the value of these bonds having finally about doubled, he was required to account to the corporation for the profits actually realized by such purchase. Mr. Justice Ladd, upon the point of his accountability for these profits, said: "What was his relation to the corporation and the stockholders after he took possession of the road? Undoubtedly he was the representative of the beneficial mortgagees. In his relative character of trustee, he was mortgagee, and in all matters arising between him in that capacity and the corporation, he is to be regarded as a mortgagee in possession. But it is as trustee of the bondholders, and not otherwise, that he is mortgagee in possession. He does not act as an individual at all. The question we are to decide does not arise between the bondholders and the corporation, or between Mr. Elliot, as trustee of the bondholders, and the corporation, but between Mr. Elliot in his individual capacity and the corporation; and I do not see how it is affected one way or the other by the fact that as trustee of the bondholders he was a mortgagee in possession. Grant that in that capacity his interest and duty were antagonistic to that of the mortgagors, it is only in protecting and enforcing the rights of his *cestuis que trust* that his

conduct is to be governed by the duty thus imposed. He certainly cannot justify an individual act, otherwise inadmissible, on account of his relations with the plaintiffs, on the ground that such act would have been admissible had it been done in his representative capacity. Suppose, as is said, a mortgagee in possession may buy in other incumbrances on the same property, or other demands secured by the same mortgage, for less than their face, and then hold them against the mortgagor at par; what application has that to this case? What other incumbrances were there to be bought? Mr. Elliot, as trustee of the bondholders, and so mortgagee in possession, represented all the bondholders. It is plain that, as such trustee, he could not buy in any other incumbrances for a variety of reasons, among which, in addition to the one already given (that there were no others), may be mentioned the fact that he had no authority, express or implied, from his *cestuis que trust* to do so, and none of their money with which to make the purchase. The simple statement of the matter is, that Elliot, in his representative capacity of trustee and mortgagee, bought no bonds. He bought them as an individual, and as an individual he was not mortgagee. So this is not the case of a mortgagee dealing in the incumbrances upon the estate.

"What duties, if any, towards the corporation and the stockholders, did Elliot's act in taking possession of the road impose upon him? It was the deed of the corporation that made him trustee and agent of the bondholders, and clothed him with the character of mortgagee. It must be very clear that he cannot, as an individual, or as mortgagee in trust, owe any duties to the mortgagors inconsistent with the duty he owes under the deed to the bondholders. Full effect must be given to the deed through him, and the legal rights of the beneficial mortgagees are not to be impaired by any act done by him, whether in the interest of the mortgagors or in his own individual interest. It may be admitted that, as trustee of the bondholders, he owes the mortgagors no duties except those which the law imposes upon mortgagees in possession; but, at the same time, I think it cannot be denied that as an individual he stands in a relation to them of great delicacy as well as responsibility. Without any personal interest he is in possession of their property and franchise, holding under the deed, primarily, for the benefit of the bondholders, ultimately, when the bonds are paid, for the corporation and the

stockholders. The corporation created the trust in favor of the bondholders. He was selected and appointed by them, and in view of the very important duties that all knew might eventually arise, he must have been chosen on account of his known or supposed ability to do well what by the provisions of the deed might in the end be required of him. Such a selection on the face of it implies high personal confidence and trust. By accepting the position and entering upon the active performance of its duties, he took upon himself, as it seems to me, an implied obligation to protect and preserve the interests and rights of the corporation, just as much as he did to enforce the rights of the bondholders under the mortgage; nor were his duties to these parties really at all repugnant or incompatible. With respect to the management of the property, which was in reality the main thing to be attended to, their interests were identical. The legal interest of the bondholders was that the bonds be paid; the interest of the mortgagors was clearly the same. Each interest alike called for a wise and efficient management of the road. The legal rights of the mortgagors were the exact counterpart and complement of the rights of the mortgagees. His duty to one commenced just where his duty to the other ended. There was no clashing, but still no open ground which any other interest could be permitted to invade. Nothing was called for but a just and disinterested administration of the affairs intrusted to him, with a single eye to the rights of the two parties whose interests were thus placed in his care. Any act done by him in this situation of things, whereby his own private interest as an individual should be brought into antagonism and hostility to the interests of the mortgagors, would, in my judgment, be just as much a renunciation of his implied obligations to them, just as much a breach of the duty and trust he had undertaken on their behalf, as would an act bringing his individual interest into hostility to those of the bondholders be a breach of his duty to them. . . . . It is true, as the defendant says, that the legal liability of the corporation upon the bonds has all the time been to pay their full amount, with interest, to the holders. It is at the same time true, that when the bonds are selling in the market or otherwise at fifty cents on a dollar, the debt might be extinguished by the corporation for one half the amount they are legally liable to pay. The actual value of the bonds was all the time measured by the amount for which

they could be sold, and this would depend upon the understood ability of the corporation eventually to pay them in full. Now, when Mr. Elliot, after he had taken possession of the road under the mortgage, became the owner of $46,000 of the bonds secured thereby, his individual interest lay strongly in the direction of enhancing their salable value, and so of increasing the amount for which the corporation might procure the extinguishment of the debt and remove the mortgage. The master finds that his buying up the bonds was in part the cause of advancing their price from about fifty per cent. to about par. His duty to the bondholders did not call for any such private speculation for such a purpose; and even though it should be said that a legal wrong was not thereby done the mortgagors, inasmuch as their undertaking was to pay the full face of the bonds, the proceeding, nevertheless, strikes my mind as quite inconsistent, in an equitable point of view, with the relation of confidence and trust in which he stood to them."

361. The trustees represent the bondholders in suits affecting the mortgage security. — The rule of chancery pleading, which allows some parties to sue or be sued in behalf of all, where their right is the same and their number is so large as to render it difficult to bring them all before the court, is especially applicable in all suits for the foreclosure of railroad mortgages. Such mortgages are almost invariably made to trustees; and ordinarily the trustees represent the bondholders in all matters of litigation respecting their common and general rights. Whether they are plaintiffs seeking a foreclosure, or as subsequent mortgagees are made defendants, they represent the bondholders for whom the trusts are held, and a decree is ordinarily as binding on such bondholders as if they had been made parties. The bondholders are in such case *quasi* parties to the suit, and have the right at any time to intervene and become actual parties.[1] They may come in under the decree and take the benefit of it, or, so long as the proceedings are not definitely closed, they may obtain a hearing, and show the proceedings to be erroneous. "Where complainants are allowed to dispense with parties on account of their numerousness, any one of whom would have a right to come in by petition and be made a party, if necessary, to protect their

[1] Campbell *v.* Railroad Co. 1 Woods, 368.

interests, they ought to proceed with the utmost fairness and good faith, and not resort to anything like sharp practice in procuring a final decree, which is to be binding on all. Any deviation from this requirement would be a proper ground to be considered on the question of opening or setting aside the decree at the instance of such an omitted party. The court would not tolerate any conduct of the complainants calculated to lull such parties into security and induce them to remit any degree of watchfulness in regard to their interest which they would have otherwise exercised." [1]

The trustees of a railway mortgage have sufficient authority and interest to enable them to maintain a bill in equity to enjoin an alleged illegal proceeding which will seriously depreciate the value of the bonds secured, or to maintain a bill to contest a claim of priority made in behalf of another mortgage under which the road and its property are about to be sold; especially when the bondholders are numerous and widely scattered, the trustees, as representing them and holding the title to the road and property, have a right to apply for judicial intervention to have the question of priority settled before any sale is attempted.[2]

362. If in any case the trustees, to whom a corporation mortgage is made, fail or refuse to act, any of the bondholders, for themselves and in behalf of the rest, may step forward and put in motion the machinery of the law, making the trustees parties defendant. Especially if in any case the bondholders can show that some fraud has been practised or connived at by the trustees, or that they have been made the victims of fraud, the bondholders may apply to the court for such relief as a party to the suit would be entitled to; or they may institute such other auxiliary, revisory, or supplemental proceedings as a party to the suit might institute; thus, they might bring a bill of review, or a bill for relief against a fraudulent decree, or conjoin both in one.

There can be no doubt of the right of bondholders to maintain an action to restrain a fraudulent diversion of a portion of property mortgaged for their security, when one of the mortgage trustees is in collusion with the company in effecting such diversion of the property; as where, for instance, the company, after

[1] Per Mr. Justice Bradley, in Campbell v. Railroad Co. *supra*.

[2] Murdock *v.* Woodson, 2 Dill. 188.

purchasing a large amount of iron rails for the use of the road, which, as after-acquired property, were covered by the mortgage, authorized one of the trustees, who was also the construction agent of the company, to pledge, sell, or dispose of the iron, for the purpose of raising money to meet the construction account of the road. If the bondholders could not do this, their rights and interests would be wholly without protection; for the directors of the company authorized the disposition of the iron in violation of the plain terms of the mortgage, and under the circumstances of the case, it might well be inferred that the other trustees acquiesced in the acts of the trustee who was the construction agent, and to whom the active management of the business was intrusted.[1]

II. *Effect of Notice to Mortgage Trustees.*

363. Notice to trustees under an ordinary mortgage deed of a railroad company is notice to the holders of the bonds secured by the mortgage. Such trustees are considered in the light of agents for the negotiating of the loan. They act for those who lend their money on the security of the mortgage. They are charged with the duty of protecting the interests of the bondholders, who are unconnected individuals, having no ready means of acting together except through the trustees, whom the law appoints to act for them.[2] Notice to the trustees is held to affect the title in their hands with reference to incumbrances upon the trust property. Actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the incumbrance.[3] "The fact that the bonds are treated as negotiable, and pass from hand to hand like bank bills, does not affect the question of the agency of the trustees in reference to the security provided by the mortgage. Such bonds purport to be secured by a mortgage in trust to trustees who are designated and known. They are negotiated and purchased upon the security thus existing. That security consists in the property and title which exist in the trustees. By the purchase of the bonds, the purchaser voluntarily adopts the security as it exists in the trustees, and becomes *cestui que*

[1] Weetjen *v.* St. Paul & Pacific R. R. Co. 4 Hun (N. Y.), 529, 538.

[2] Pierce *v.* Emery, 32 N. H. 484, 521, per Chief Justice Perley.

[3] Miller *v.* Rutland & Washington R. R. Co. 36 Vt. 452.

trust under them, thereby adopting said trustees as his agents for holding the existing title, and administering the property held thereby to the intents specified in the creation of the trust. The question is not as to how *cestuis que trust* would be affected by notice to trustees of transactions subsequent to the creation of the trust, or to their becoming *cestuis* under the trust, but as to how they are affected by notice to the trustees which, as to them personally, affects the legal estate at the time, and in the act of their becoming trustees.

"The notice, which the law regards as effectual to charge a subsequent purchaser, is such as, if duly heeded and properly pursued, would lead to a knowledge of the true character, in point of fact, of the prior incumbrance, and thus charges him with the legal consequences of such prior incumbrance, however he may judge of the validity, in point of law, of such incumbrance, or of the legal consequences that may flow from it. By the fact of such notice, being charged with a knowledge of such incumbrance, if in fact it existed, the law regards the taking of a subsequent conveyance, in prejudice to such incumbrance, as being in bad faith on the part of the purchaser, even though in truth he took such conveyance, either in heedless disregard of the notice, or upon the supposition that the prior claim was invalid, or in doubt whether it was valid or not, and thought best to take his chances in that respect; and not with any wish or design to defraud anybody. Indeed, the true idea of fraud, as involved in this subject, is not so much that there is fraudulent intent on the part of the subsequent purchaser in taking the conveyance, as that, to permit it to be set up and enforced, as against the prior equitable title, would operate a fraud as against that title. This is the elemental idea of an estoppel *in pais*, in its ordinary application; to which the principle upon which a subsequent purchaser is charged by a notice of a prior equitable title is strikingly analogous, if not precisely identical with it."[1]

"Then as to the practicableness of a contrary doctrine. The very fact that the bonds pass from hand to hand, and without any record or notice, and are changing hands every day to a greater or less extent, shows that the matter of fixing an equity by notice would be practically impossible. It cannot be known in whose hands all, or any considerable portion, of the bonds are at any

[1] Per Barrett, J., in Miller *v.* Rutland & Washington R. R. Co. *supra.*

given time, nor in whose hands they will be the next day, or next month. Of course notice would affect only the party to whom it was given, as there is no joint interest, or representative relation, between the different holders of the bonds. Nor would notice to a holder of specific bonds to-day affect a person who without notice should, in good faith, be the holder of the same bonds to-morrow. The result must necessarily be, that however well grounded an equity a party might have against the corporation, and against the trustees personally, attaching upon the legal title held by such trustees, it would prove barren and futile to any beneficial intent, by reason of the impossibility of knowing and notifying the ever-shifting parties who have an interest, and claim an equity, subsequently created and subsequently accruing. On the other hand, it would be easy, comparatively, for persons desirous of investing in railroad mortgage bonds to apply to the trustees holding the security, and elicit the true state of the title. We think it no hardship that they should be required to do so, if they would avoid the hazard of finding their security subject to prior incumbrances, when it might be too late to save themselves from the consequences of such a state of the title."

364. Notice, however, to trustees who take a conveyance for the mere purpose of upholding an estate, without having any previous connection with the title, is not always regarded as notice to the *cestuis que trust*.[1] Yet in a case where the only trust expressed in a mortgage by a railroad company to trustees was to hold the property to secure the payment of the bonds named, it was held that an active, administrative trust was created, under which, even after a foreclosure, the trustees were authorized to make a lease of the road and property for a term of ten years, against the protest and remonstrance of a large majority in amount of the bondholders; and the objecting bondholders having obtained an injunction against the use of the road by the lessees, they were compelled to pay heavy damages for the injury done to both the lessors and the lessees by the injunction.[2]

Notice to one mortgage trustee of irregularities in a county subscription does not operate to destroy the *bonâ fide* holding of bondholders under a deed of trust which includes, with the mort-

[1] Pierce *v.* Emery, 32 N. H. 484, 521, per Chief Justice Perley.

[2] Sturges *v.* Knapp, 31 Vt. 1, 54; *S. C.* 36 Vt. 439.

gaged property, county bonds issued under such subscription, but the trustees may enforce in behalf of the bondholders the payment of bonds given in payment of such subscriptions, and the bondholders are just as much entitled to the character of *bonâ fide* holders without notice as if no notice had ever come to any of the trustees.[1] They are not to be regarded as the agents of the purchasers of the bonds but merely assignees, coupled with no interest, of the legal title of the property in trust for whoever may become purchasers of the bonds.[2]

III. *Rights of Mortgage Trustees in Possession.*

365. Mortgage trustees on taking possession can use the franchise so far as necessary. — Authority to a railroad company to issue bonds and "secure the payment of the same by mortgage, or deed of trust, on the whole or any part of the road, property, and income of the company, then existing or thereafter to be acquired," implies the authority to clothe the grantees with all needful powers to use the thing conveyed, in a proper and beneficial manner. Under such a deed, transferring the whole property to trustees and empowering them upon default to take possession of the road and to hold and manage it for the uses of the trust, the inquiry arose whether the trustees upon taking possession could exercise the franchises of the company in this manner. It was held that the trustees were not limited to using and operating the road as the agents of the company to which the franchise was granted, but might use and operate it in their own name and right, and enjoy the franchises granted to the corporation so far as necessary for the enjoyment of the property mortgaged to them.[3] As to the intention of the legislature in authorizing the construction of the road, and afterwards the borrowing of money by mortgage to enable it to construct and equip the road, Chief Justice Caton said: "If it was the intention that the road should not be taken up and destroyed for the payment of the mortgage debt, but that it should be sold subject to the duty towards the public of continuing and operating it as a road, it follows necessarily, that it was the intention of the legislature that those into whose hands the road might fall, and upon whom this duty to

[1] Commissioners of Johnson County *v.* Thayer, 94 U. S. 631.

[2] Curtis *v.* Leavitt, 15 N. Y. 9, 194, 195.

[3] Palmer *v.* Forbes, 23 Ill. 301, 302.

the public of running and operating the road would devolve, should possess all the necessary rights and powers to enable them to perform this duty. . . . . Perhaps it is not too much to say, that the extent of right conferred upon the company for the purpose of enabling it to finish, repair, and operate the road, was designed to be impliedly conferred upon the mortgagees in possession or purchasers under the mortgage, to enable them to accomplish the same object; but it is not necessary now to say this, but we do say unhesitatingly, that the trustees or purchasers are endowed with sufficient powers, which are undoubtedly in the nature of a franchise, to enable them to discharge the duty which the public have a right to demand of them, by keeping in repair, maintaining, and operating the road, and to demand and receive a suitable reward therefor, and for this purpose they may use their own proper names, or adopt any other convenient business name, as any other individual or company may do, and they are under no necessity of adopting the name of the company to whose rights in the property they have succeeded."

When mortgage trustees have taken possession of a railroad upon default under authority given by the mortgagee, they are entitled to retain possession until the whole debt is paid, unless the mortgage provides that they shall surrender possession upon receiving payment of the instalment then due.[1]

366. In like manner when mortgage trustees obtain an absolute foreclosure by writ of entry and possession for three years, they hold this absolute title in trust for the bondholders and for no other parties, and unless the bondholders organize a new company, the trustees execute their trust by disposing of the property and distributing the proceeds among the bondholders, *pro rata*. After the title has become absolute in this manner, the mortgagors and their privies in estate cannot be heard to object that the mortgage was not properly sealed, or that, on a true construction of its terms, an absolute judgment of foreclosure should not have been entered. The title of the trustees rests upon the judgment of foreclosure, and they may have a decree declaring their rights as against all parties claiming under the mortgagors by titles acquired subsequently to the mortgage.[2]

[1] Wood *v.* Goodwin, 49 Me. 260.

[2] Haven *v.* Grand Junction R. R. & Depot Co. 12 Allen (Mass.), 337. And see Kennebec & Portland R. R. Co. *v.*

367. The trustees may lease a road the title to which they have gained by strict foreclosure. — The Western Vermont Railroad Company executed a mortgage of its road and franchise to trustees, which contained no provisions in regard to the rights and duties of the trustees, either before or after foreclosure. In consequence of a default, the mortgage was foreclosed by a decree of strict foreclosure in the ordinary form, simply declaring that, if certain specified sums were not paid on or before certain specified times, the mortgagors should be foreclosed from all equity of redemption in the mortgaged property. Payment not being made in accordance with the decree, the title became absolute in the trustees. The bondholders were numerous, and widely scattered, and had no legal organization. No statute then existed in the state under which such bondholders, or the purchasers at a foreclosure sale, were authorized to organize themselves into a new corporation. The trustees had no rolling stock for the road, and no means of purchasing any. For a short time the trustees operated the road through an agent, but at a material loss. Shortly after acquiring full title to the property the trustees leased the road to the Troy and Boston Railroad Company, a corporation created by the State of New York, owning a connecting road, for a period of ten years, for a satisfactory rent. The lease provided that if a majority in amount of the bondholders should, within ninety days from the date of the lease, unite in giving notice in writing to the lessees of their desire to terminate the lease at the expiration of one year, the lease should so terminate. The lessees went into immediate possession, and within ninety days from the date of the lease a committee, representing the holders of a majority of the bonds, instead of giving the notice provided for, gave notice that they denied the power of the trustees to make the lease, and that they regarded the lessees as trespassers in the use of the road. The lessees still retaining possession, certain bondholders, in behalf of themselves and all other bondholders, who should come in to prosecute the suit, brought a bill praying for a decree, that after the foreclosure the trustees had no right to make any disposition of the road except to convey it to the bondholders, and that the lease was null and void. But the court dismissed the bill, holding the lease to be valid.[1] Chief Justice

Portland & Kennebec R. R. Co. 59 Me. 9, 47.

[1] Sturges *v.* Knapp, 31 Vt. 1; and see *S. C.* 33 Vt. 486; 36 Vt. 439.

Redfield delivered the opinion of the court and fully examined the nature of the estate in the trustees created by the mortgage, the forfeiture, and the foreclosure. This was regarded as depending almost exclusively upon the implications growing out of the state of the property, the purposes desired to be accomplished, and the mode provided for that end. The chief inquiry was, whether the functions imposed by the trust ceased upon the foreclosure, and there remained nothing further to be done except to convey the estate to the bondholders. "When we look at the position of affairs at this time," said the learned judge, "it seems difficult to come to any such conclusion. The powers and duties of the corporation, in regard to the road and its franchises, under such a mortgage and foreclosure, must be regarded as effectually terminated for all practical purposes. The trustees and the *cestuis que trust*, one or both, had effectually become the corporation, or had acquired all its essential rights, and assumed all its duties, so far as the public was concerned. And these were important and pressing. Delay for the shortest interval might be attended with disastrous consequences to the continuance of the franchise even, and must be so, in every view, to the interests of the *cestuis que trust*. The road could not, in strict propriety, be allowed to stop for a single day; and it could not be allowed to cease operation for any considerable time, with any safety to the interests of those to be affected by the depreciation of the property, and the intervention of counter-interests and influences. The *cestuis que trust*, the holders of these bonds, were a changing, unorganized body, having no common bond of union, and no recognized principle of action, unless by unanimity of consent, which is practically impossible. It would not be expected under such circumstances that there should be an immediate surrender of the property to this heterogeneous and chaotic mass of men, women (single and married), and infants, many of whom were under such disabilities that they could not act for themselves, and where consequent delay must ensue in providing the means of obtaining their consent in a legal form, which must be fatal to the enterprise. All this must be regarded as in the contemplation of the parties at the time of entering into the contract, by which the bonds were issued. It must be so regarded in looking for the true construction of the contract, for in that we are attempting to obtain the mind and will of the parties at the time of making the contract in re-

gard to the state of facts which has now intervened; and it will, perhaps, fairly test this, to ask ourselves, what would have been their probable response, had the inquiry been put to the parties: What shall be done with this property, and how shall it be managed, in case of foreclosure? Shall the trustees continue to manage it for the time being, and until the order of the Court of Chancery, as in the case of other trusts? It seems to us there can be but one response to this question. The trustees seem to have been selected for this very office, among others, of controlling and managing the property in case of forfeiture and surrender, *as trustees*, for the benefit of the *cestuis que trust*, in order to make it available for the payment of the bonds, both interest and principal. This must be so until some organization of the bondholders, and the acquiring of some capacity to act, by a majority, or in some such way, as to enable them to discharge this new class of duties thrown upon them by the forfeiture of the condition of the mortgage, and the surrender of the road with its incidents and fixtures."

A strict foreclosure is now very rarely had; but it is conceived that the duties of trustees who purchase mortgaged property at a foreclosure sale for the benefit of the bondholders would be precisely the same as those of trustees who acquire the title by a decree of strict foreclosure. Provision, however, is now quite generally made by statute for the organization of purchasers at such a sale into a corporation, so that the management by trustees after foreclosure need be only temporary, and until such organization is completed.

368. **No right of set-off can accrue against the trustees under a mortgage after they have entered into possession** of the mortgaged road. Thus the Wallkill Valley Railway Company having made default, the trustees entered into possession and received the rents and tolls for the benefit of the bondholders. They subsequently brought suit against an agent of the road for money collected by him from the post-office department of the United States for carrying the mails upon the road after the trustees had taken possession, and the agent claimed to be entitled to set off a note given by the company to him while in their service, before the default, and which had not matured at that time. The right of the trustees to the earnings of the road was declared to

be absolute from the time they took possession, and therefore the agent could not make any offset of such note.[1]

369. Trustees for bondholders retain their trust so long as it has not been fulfilled, and any part of the subject matter of the trust remains to be disposed of, unless they have been discharged or in some way incapacitated from executing their trust. The trustees of the Western Vermont Railroad, having by a strict foreclosure gained an absolute title in trust for the bondholders, leased the road for a term of years, and at the expiration of the lease brought suit upon the covenants of the lease. It was objected, however, that before the expiration of the lease a new corporation was organized by a majority of the bondholders of the defunct corporation, under the laws of Vermont, who had converted their bonds into stocks, and that the new corporation was, by the provision of the statute under which it was formed, substituted as trustee for the other bondholders in place of the plaintiff in error, and had thus become the real party in this suit.[2] "Manifestly," said Mr. Justice Davis, of the Supreme Court of the United States, "it is not in the power of a state legislature, without the consent of the *cestuis que trust*, to substitute a new trustee in place of the persons named in the mortgage. This would impair the obligation of the contract. The salability of railroad bonds depends in no inconsiderable degree upon the character of the persons who are selected to manage the trust. If these persons are of well-known integrity and pecuniary ability, the bonds are more readily sold than if this were not the case. It is natural that it should be so, and on this account the trustees usually appointed in this class of mortgages are persons of good reputation in the cities where these bonds are likely to sell. To change them is to change the contract in an important particular, and this cannot be done without the consent of the parties for whose benefit the trust was created."

370. Mortgage trustees in possession are liable as common carriers to the same extent that the corporation itself would be liable. Unlike receivers in possession they are liable for the negligence of those employed in operating the road, whereby damages occur to property or injuries happen to persons. They are merely

[1] Murray *v.* Deyo, 10 Hun (N. Y.), 3. [2] Knapp *v.* Railroad Co. 20 Wall. 117.

the agents of the bondholders, and can claim no immunity by reason of holding an official position.

Trustees in possession under a mortgage of a railroad, its property and franchises, for a breach of condition are liable in damages, under a statute making railroad corporations responsible for injuries to land upon the line of the railroad from fire caused by a locomotive engine. When such a mortgage is duly made with legislative authority, the trustees to whom it is executed stand in the place of the corporation vested with all the rights, and subject to all the liabilities incidental to the exercise of the franchise and the operation of the railroad.[1]

The mortgage trustees of a railroad company in possession and operating the road in the name of the company are liable to be sued for matters occurring under their management in that name. When such trustees have defended a suit brought in the corporate name of the company, and have given no public notice of any change in the name by which they carried on the business, it is too late for them to say that they had another name.[2] The trustees have an undoubted power in the nature of a franchise to discharge their public duty by keeping the road in repair and operating it, and for this purpose they may use their own names or adopt any other convenient business name; and they are under no necessity of adopting the name of the company; and if they do, they cannot object to a suit against them by the name they use.[3]

IV. *Removal of Trustees and Filling of Vacancies.*

371. A court of equity may remove a non-resident trustee of a railroad mortgage and appoint another in his stead, by an *ex parte* proceeding, when service upon the absent trustee is impossible, and the action of the court is invoked for the purpose of preserving the mortgaged property; and the fact that the absent trustee is within the territory of a country at war with the country in which the court is sitting not only does not prevent the exercise of this power, but furnishes a good reason for its exercise.[4] The Mobile and Ohio Railroad Company, incorporated under the laws of the State of Alabama, in 1853, executed a mortgage to three trustees, two of whom resided in New York and the other

[1] Daniels *v.* Hart, 118 Mass. 543.
[2] Wilkinson *v.* Fleming, 30 Ill. 353.
[3] Palmer *v.* Forbes, 23 Ill. 301, 318.
[4] Ketchum *v.* Mobile & Ohio R. R. Co. 2 Woods, 532.

in Alabama, of its railroad and franchises in trust to secure bonds to the amount of $6,000,000. The mortgage also covered a land grant of one million one hundred and fifty-six thousand six hundred and fifty-eight acres of land. The deed provided that the trustees should have control of these lands, should invest the proceeds of all sales of them as a sinking fund for the payment of the bonds, and should render an account of their doings on or before the first day of January in each year. The deed also provided that if either of the trustees should die, or become incapacitated from any cause, or resign his office, then the said company, or the other trustees or trustee, might select some other person to fill the vacancy. In 1862, two of the trustees having died, the company filed a bill in the Court of Chancery for the County of Mobile, in Alabama, against the other trustee, Morris Ketchum, who was a citizen of New York, and was not a bondholder, stockholder, or officer of the railroad company, charging that he had neglected his duty as trustee, and refused to unite with the company in the appointment of new trustees; that the trust property was entirely within the Confederate States, and that he was an alien enemy; that the trust property was suffering for want of a trustee capable of acting, and that the interests of the holders of bonds, secured by the trust deed, imperatively demanded the appointment of trustees residing within the territory of the Confederate States, who could perform the duties incident to the trust. The bill prayed that this trustee might be removed, and that the court would fill the three vacancies by appointing new trustees. Notice of the proceedings was given by publication according to the Code of the state, and a decree was made as prayed for. The new trustees entered upon their duties and into the possession and management of the lands, and continued the trust without challenge or question until the nineteenth day of April, 1875, when two of the trustees resigned, and the remaining trustee and the railroad company, in accordance with the provisions of the deed of trust, appointed two other trustees, who entered upon the duties of the office. In May, 1875, the trustees took full possession of all the property of the railroad company for a breach of the condition of the mortgage, and filed a bill in equity to be confirmed in their possession and for foreclosure. On the fourteenth day of March, 1876, Morris Ketchum, who had in 1865 learned of his removal, but had hitherto made no claim to the office, filed a bill in which he alleged

that he was the sole surviving trustee, and prayed that the property might be sold for the benefit of the bondholders, and that a receiver be appointed to take charge of the property in the mean time. Mr. Woods, the circuit judge, delivered the decision of the court,[1] in which he said: "I think this case is clearly distinguishable from those cited by complainant. Ketchum was a naked trustee. He had no personal interest in the property conveyed to him by the trust deed. It was a property which, according to the record, cost $20,000,000, and the *cestuis que trust* of this immense estate were scattered all over the United States and Europe. Ketchum's co-trustees were both dead, and the war which existed between the United States and the Confederate States rendered Ketchum as impotent to discharge the duties of the trust as if he also had been dead. The interest of the *cestuis que trust* imperatively demanded the services of a trustee. In this condition of things the settler of the trust, namely, the railroad company, applied to a court of competent jurisdiction, alleging neglect of duty on the part of the surviving trustee, and stating such facts regarding the trustee as showed that it was impossible for them to discharge the duties of his trust by reason of the war then raging. The filing and averments of this bill, and the subsequent proceedings and decree, were in strict conformity with the statute law of Alabama, which had been enacted and was in force when the trust deed was executed." The learned judge further said that the proceedings of the court were not at any rate absolutely void by reason that service was not made upon the absent trustee, whom it was impossible to reach by notice; that the court might doubtless have acted in an *ex parte* proceeding for his removal and the appointment of a new trustee; that the action of the court was at least effectual for the valid appointment of trustees to act during the disability of the surviving trustee, even without notice to him, and that the long inaction of the complainant after he learned of the decree removing him from his trust, without any attempt to assert his rights to the property, was an abandonment of any title he may have had to the office of trustee, and an acquiescence in the order of things established by the Mobile Chancery Court.

A decision inconsistent with the foregoing was rendered in Virginia, but it can hardly be regarded as authority. A deed of trust of the Alexandria and Washington Railroad Company provided

[1] Ketchum *v.* Mobile & Ohio R. R. Co. *supra.*

that in case of the death, incapacity, or resignation of the trustee, the vacancy might be filled by an appointment to be made by any court of record in the county of Alexandria on the application of the holders of three fifths of the bonds secured, and notice to the president or one of the directors of the company. During the War of the Rebellion the trustee, president, and directors of the company went within the lines of the Confederate forces and remained there during the war. In the mean time an application was made to a court of said county to appoint a new trustee; and a trustee was accordingly appointed without giving notice, but upon affidavit that no officer or agent of the company could be found upon whom notice could be served. The new trustee proceeded to sell the property under the trust deed. The Military Court of Appeals of Virginia held the appointment void for want of proper notice.[1]

372. A trustee under a railroad mortgage who voluntarily removes to a foreign country and becomes a resident there incapacitates himself from discharging the duties of his office, and may be enjoined from acting as such trustee, and from further prosecuting an action in that capacity. The Milwaukee and St. Paul Railway Company executed a mortgage to two trustees, one of whom died, and the duties of the trust, by the terms of the deed, devolved upon the surviving trustee. The deed provided for the removal of the trustees, or either of them, by a vote of a majority in interest of the holders of the bonds, at any meeting called for that purpose; and in case of the death, removal, resignation, incapacity, or inability of both or either of the trustees, it was further provided that a majority of the holders of the bonds might designate and select, in writing, one or more competent persons to fill the vacancy. The Farmers' Loan and Trust Company was accordingly so selected in place of the surviving trustee, upon the assumption that he had permanently removed from the state and become a resident of France, he having resided there for upwards of ten years with the exception of slight intervals spent in this country. The evidence established the charge of non-residence. The trust conferred was personal and incapable of delegation. Such a trustee is generally selected

[1] Washington, Alexandria & Georgetown R. R. Co. *v.* Alexandria & Washington R. R. Co. 19 Gratt. (Va.) 592.

because of confidence in his integrity and capacity, and especial fitness for the duties imposed by the trust. The duties of a trustee under such a mortgage are: "First, those which will arise in the event of the non-payment of interest, and of foreclosure, namely: To enter into and upon and to take actual possession of all the property, real and personal, and rights and franchises of the railway company, and to hold, use, and enjoy the same; to make repairs, etc.; and to collect and receive all tolls, freight, income, rents, issues, and profits of the same, and of every part thereof. In the contingency of foreclosure, there are also these further duties to discharge, namely: To sell at public auction, to the highest bidder, the entire property, real and personal, of the railway company; to give the proper notices of sale; to execute the necessary conveyances; and after such sale, to distribute the moneys derived from operating the railway, and the proceeds of sale, in their proper order, among the parties entitled thereto, or, at the request of a majority of the bondholders secured by the mortgage, to buy in the property, real and personal, of the railway company, at the foreclosure sale, and thereupon to organize a new corporation, and to convey the premises purchased to such new corporation." With these obligations resting upon him the court declared that a permanent residence abroad, or even a temporary residence which rendered the full discharge of the duties of the trust uncertain, would revoke the trust, and therefore held that his removal was, *primâ facie*, authorized, and that he should be restrained from acting as trustee, and from prosecuting any action in his name as trustee.[1]

373. A trustee under two railroad mortgages will not be removed, for the reason that he declines to employ counsel for the foreclosure of the first mortgage, selected by a majority of the bondholders under that mortgage, and also declines to elect to act as trustee under one of the mortgages only, and to resign his trusteeship under the other. It does not avail that the application is made by a majority of the bondholders, for they have no absolute right to demand a removal. A removal will not be made without sufficient grounds.[2] Such complaints do not affect the character of the trustee for integrity. It may be that he is acting

[1] Farmers' Loan & Trust Co. *v.* Hughes, 11 Hun (N. Y.), 130.

[2] Beadleson *v.* Knapp, 13 Abb. (N. Y.) Pr. N. S. 335.

with sound judgment in declining to act separately in foreclosing either of the mortgages upon the default which has occurred. The question whether the road shall be sold under foreclosure in parcels, according to the portions included in the two mortgages, is probably one of nice discretion, to be judicially determined by the court with reference to the effect of the sale upon the interests of the bondholders under both mortgages, and upon the stockholders as well.

374. A statute providing that in case a railroad be in possession of trustees under a mortgage, the bondholders may annually nominate a board of five trustees, and present their proceedings to a chancellor for the purpose of obtaining a decree, confirming the nomination of the new trustees, and of transferring the property from the old to the new trustees, impairs the obligation of contract contained in a mortgage made prior to the statute, which provides for a succession of trustees by empowering the surviving trustee to fill any vacancy, and upon his failure so to do gives the railroad company a right to apply to a court of chancery for the appointment of trustees; and consequently such a statute is in this respect repugnant to the provision of the Constitution of the United States, which prohibits a state from passing any law impairing the obligation of a contract.[1] The effect of the act was to confer upon the chancellor the right to control not only the equitable interests of the bondholders, as well as of the railroad corporation, but also the legal title in the trustees; and this is while the trust is still an active one, involving active duties on the part of the trustees, and while they have personal claims upon the trust property for indemnity for advances made and liabilities incurred. It was, moreover, a matter of election with the bondholders that they have become such, with the trustees the railroad company had constituted, and with the trusts specified in the deed, including the power of perpetuating the board of trustees. The bondholders, too, had an interest in the personal administration of the trust by the trustees named in the mortgage, and those who should be appointed in pursuance of the power therein contained. The trustees themselves had certain vested rights secured to them by the deed, and a legal interest in their office, and they cannot be divested except by due course

[1] Fletcher *v.* Rutland & Burlington R. R. Co. 39 Vt. 633.

of law. The railroad corporation itself had an interest in the administration of the trust; and the law will not be allowed to impair their vested rights.

375. Where it is provided that any vacancies in the board of trustees under such a mortgage shall be filled from the bondholders, an election of persons who have qualified themselves for the purpose, by procuring bonds, is valid unless fraud was intended.[1] Neither does such a trustee discharge himself or disqualify himself from executing the trust by subsequently parting with the bonds required as a qualification.[2] He cannot, after acceptance of the trust, disqualify himself by his own act. He can only be discharged by virtue of a special provision in the deed creating the trust, or by decree of a court of competent jurisdiction; unless, perhaps, it be with the general consent of all persons interested in the execution of the trust.

376. When a trust mortgage provides that any vacancy occurring in the board of trustees shall be immediately filled, and the intention is apparent that the board shall always be kept full, no proceedings can be taken by the trustees or any of them while there is a vacancy in the board; they cannot take possession of the mortgaged property, or bring suit to foreclose the mortgage. If a suit has already been commenced when a vacancy occurs, it does not thereupon abate, but must be postponed until the vacancy is filled.[3]

V. *Statutory Provisions regulating the Duties of Mortgage Trustees and the Choosing of New Trustees.*

In the New England States there are statutes which prescribe more or less fully the duties of trustees under railroad mortgages, and provide for the choice of new trustees at stated times, or upon the happening of vacancies. The principal provisions of these statutes are given, as they are essential and important parts of the law in these states governing railroad mortgages.

[1] Richards *v.* Merrimack & Conn. River R. R. Co. 44 N. H. 127.

[2] Richards *v.* Merrimack & Conn. River R. R. Co. *supra.*

[3] Shaw *v.* Norfolk County R. R. Co. 5 Gray (Mass.), 162.

377. Maine.[1] — When a railroad corporation mortgages its franchise for the payment of its bonds or coupons, and trustees are appointed by it, or by special law, or by the mortgage, the bondholders, at a regular meeting called for the purpose, may from time to time elect by ballot new trustees to fill vacancies, or take the place of others holding the trust; but no trustee can be thus removed until he is paid for all that is due him, and secured against all liabilities assumed by him as such trustee. Any party interested may present the proceedings of such meeting to the Supreme Judicial Court, or to a justice thereof in vacation, who thereupon appoints a time of hearing, and orders such notice to parties interested as he deems proper, and may affirm such elections, and make and enforce any decrees necessary for the transfer of the trust property to the new trustees. All such decrees are filed with the clerk of the court where the hearing is had, and recorded by him.

The neglect of the corporation to pay any overdue bonds or coupons secured by such mortgage, for ninety days after presentment and demand on the treasurer or president thereof, is a breach of the conditions of the mortgage;[2] and thereupon the trustees are required to call a meeting of the bondholders, by publishing the time and place thereof three weeks successively in the state paper, and in some paper in the county where the road lies, the last publication to be one week at least before the time of the meeting. If they so determine, the trustees take possession of such road and all other property covered by the mortgage, and have all the rights and powers, and are subject to all the obligations of the directors and corporation of such road, and may also prosecute and defend suits in their own name as trustees. They are required to keep an accurate account of all receipts and expenditures of such road, and exhibit it on request to any officer of the corporation or other person interested; from the receipts, to keep the road, buildings, and equipments in repair, and to furnish such new rolling stock as is necessary; and the balance, after paying the running expenses, to apply according to the rights of parties under the mortgage, and to the payment of any damages arising from misfeasance in the management of the road. They are not personally liable except for malfeasance or fraud. When

[1] R. S. 1871, ch. 51, § 47.

[2] R. S. 1871, ch. 51, §§ 48, 50, 51, 52. And see Act 1878, ch. 53.

all overdue bonds and coupons secured by the mortgage are paid, they must surrender the road and other property to the parties entitled thereto. The bondholders may fix the compensation of the trustees, and may instruct them to contract for the running of the road, or give them any other instruction they deem advisable; and the trustees must conform thereto, unless inconsistent with the terms of the trust.

The trustees, on application of one third of the bondholders in amount to have such mortgage foreclosed, are required immediately to give notice thereof, by publishing it three weeks successively in the state paper, and some paper, if any, in each county in which the road extends, therein stating the date and conditions of the mortgage, the claims of the applicants under it, that the conditions thereof have been broken, and that for this reason they claim a foreclosure; and to cause a copy of such notice, and the name and date of each newspaper containing it, to be recorded in the registry of deeds in each such county, within sixty days from the first publication; and unless, within three years from the first publication, the mortgage is redeemed by the mortgagors or those claiming under them, or a bill in equity as in cases of the redemption of mortgaged lands is commenced, founded on payment or a legal tender of the amount of overdue bonds and coupons, or containing an averment that the complainants are ready and willing to redeem on the rendering of an account, the right of redemption is forever foreclosed. Each holder of overdue bonds or coupons must present them to the trustees at least thirty days before the right of redemption expires, to be by them recorded; but such right is not lost by the non-payment of any claims not so presented; and the parties having the right to redeem have free access to the record of such claims.[1]

378. New Hampshire.[2] — The trustees, to whom any railroad has been assigned or conveyed in mortgage for the benefit of the creditors, are required to call a meeting of the creditors whose claims are secured by such mortgage, once a year, to be holden at some place on or near such railroad, by publication in two daily papers published in Boston, and one paper in each county in which such railroad is located. If such trustees, on application of such creditors, to the amount of one third of the whole sum

[1] R. S. 1871, ch. 51, §§ 53, 54.

[2] G. S. 1867, ch. 151, §§ 1–8; G. S. 1878, ch. 165.

secured, do not within fourteen days call such meeting, five or more such creditors holding the like amount of claims may call such meeting in the same manner. At such meeting, the trustees are required to make a report of the state of the trust property, and of their proceedings and management in relation thereto, according to the usual custom of directors of railroads, to the stockholders. The creditors at such meeting may elect by ballot three or five trustees, being creditors, and a majority at least residents of the state; each creditor being entitled to one vote for each hundred dollars of his debt, and having the same right to vote by proxy as stockholders of railroads at their meetings. Upon the election of new trustees, the interest of the former trustees must be transferred to and vest in such new trustees; and the former trustees render and settle an account of their trust to and with such successors, and pay and transfer to them the mortgaged estate, and any balance of funds in their hands; and if a balance is due said retiring trustees, the assets of the trusts are charged therewith. No trustees or assignees of any railroad mortgage, who have the railroad in their charge, are, as such, and without their own default, personally responsible for any damage, by collision or force, occurring to any passenger or to freight upon such railroad. In case of such damage, the company assigning or mortgaging the railroad is liable; and the assets in the hands of the trustees are holden for such damage as part of the expenses of the trust, in preference to the claims of the general creditors of the company. The Supreme Court has summary power to make all orders and decrees necessary to carry such trusts into effect.

379. Vermont.[1] — It is the duty of trustees, so long as they continue in possession of any railroad under a mortgage, to call a meeting of the bondholders or creditors for the security of whose claims they hold such property in trust, at some convenient place on or near the line of such road, in the month of January in each year, by giving notice of such meeting at least twenty days previous thereto, in two or more daily papers, published in each of the cities of Boston and New York, and in at least one paper published in each county through which the said road is located, if any such there be; and at such meeting the said trustees must

[1] G. S. 1870, ch. 28, § 103.

submit a report of the whole earnings of, and expenditures upon and for, the trust property and estate for the year, and also of their business and proceedings, according to the usual custom of railroad directors, to the stockholders.

Whenever the owners or holders of notes, bonds, or obligations, secured by a railroad mortgage, to an amount of not less than fifty thousand dollars, and in number, five or more, deem any trustee of such mortgage to be an unsuitable person to administer such trust, they may apply by petition to any chancellor for the removal of such trustee, setting forth in a general manner the grounds and reasons for such removal.[1] The court, thereupon, appoints some early day for hearing such petition, and gives due notice thereof to the trustees of such mortgage, and to all other persons interested, taking especial care to give notice of such application, and of the time and place of hearing, to all persons interested who reside out of this state, by publication in one or more daily newspapers published in Boston and New York. Upon the hearing, the petitioners and trustees, and all other witnesses, may be examined orally before the chancellor; or in his discretion the chancellor may appoint a special master or masters to take the testimony and report the same to the court. The witnesses are examined as to all alleged breaches of trust, or neglect, or omissions of duty; as to the fitness and competency of the trustees; as to their holding any other offices, or having any interests, either of a public or private nature, inconsistent in any way with the true interests of the *cestuis que trust*, or interfering in any way with the prompt, fair, and impartial discharge of the duties of such trusts; and as to all circumstances or conduct of the trustees which render it improper for the interests of the trust to continue them in office. If, upon the hearing, the chancellor finds that such trustee ought to be removed, he decrees his removal, appoints a new trustee or trustees, and makes such orders and decrees as to the transfer and conveyance of the trust property from the old to the new trustees, as to ascertaining the debts and liabilities of the old trustees and the payment of the same, as to the future management of the trust and the accounting thereon, and generally as to all other matters and things connected with such trust, as the exigencies of the case, the protec-

[1] G. S. 1870, ch. 28, §§ 113, 114.

tion of the old trustees, and the security and welfare of the trust fund may require.

380. Massachusetts.[1] — When a corporation, having executed a mortgage of its property, rights, and privileges, or any part thereof, to trustees, for the benefit of its general creditors or of any particular class of creditors, has made default in the performance of the condition so that the trustees or their successors are entitled to the actual possession and usufruct of the property, rights, and privileges, therein conveyed in trust for the purposes specified in the mortgage, the trustees, instead of retaining in their own hands the actual possession of the mortgaged premises and running the trains under their own direction and on their own responsibility, may contract with the corporation to take and retain for them the possession and use of the mortgaged premises, and use and operate the same on its own responsibility under the direction of its officers, accounting with the trustees for the earnings and income, and paying over the net income and profits periodically when, and as far as the same may by the terms of the mortgage be necessary for the fulfilment of its conditions, provided, that all liabilities incurred by the corporation or other party in operating the road under such contract be held as claims against and paid out of the income in the same manner and to the same extent as if the property had remained in the actual possession of the trustees, and been operated by them; and provided, that at a meeting of the bondholders or creditors under the mortgage duly notified in two or more daily newspapers published in the city of Boston, and in one newspaper at least in each county through which the road is located, ten days before said meeting, a majority in amount of those present or represented shall vote in favor of such contract, each bondholder or creditor casting one vote personally or by proxy for every hundred dollars held by him.

Trustees in possession of a railroad under a mortgage must annually notify a meeting, to be held in December, of the bondholders or creditors for whose security they hold the road in trust, such notice to be published at least ten days previously to the time of holding such meeting, in two or more daily newspapers

[1] G. S. 1860, ch. 63, §§ 124–128. For original statute see Acts 1857, ch. 178.

in Boston, and in one paper at least in each county through which the road is located; and at such meeting they must submit a report of their doings for the year, similar to the annual report of railroad directors to stockholders. On or before the thirty-first day of December, annually, they are required to transmit to the Secretary of the Commonwealth the same returns of their acts, doings, receipts, and expenditures, as are required of railroad corporations, and are subject to the same forfeitures and penalties for any default. Upon failure of the trustees to call the meeting as required, five or more bondholders or creditors, whose claims secured by the mortgage amount to not less than ten thousand dollars, may in the same manner call such meeting to be held in the January following said December. At the annual meeting held under either of these two provisions, the bondholders or creditors may elect three trustees under the mortgage for the ensuing year, and until others are chosen and qualified, each bondholder or creditor casting in person or by proxy one vote for each hundred dollars due, and secured to him under the mortgage. And the trustees, or either of them, or any bondholder or creditor, may in a summary manner present the proceedings of the meeting to a justice of the Supreme Judicial Court, in court or at chambers, the party presenting such proceedings giving notice thereof, and of his intention to move for the affirmation, to the former trustees under the mortgage, to the trustees of every other existing mortgage upon the road, and to the corporation giving the mortgage, seven days at least before the hearing thereon; which notice may be served by any officer or indifferent person. The justice may hear the parties and ratify the election, and make such order and decree as he may deem necessary and just to transfer the property to the new trustees; which order and decree are filed in such clerk's office of the court as the justice may direct. The Supreme Judicial Court, and each of the justices thereof, have full equity jurisdiction, according to the usage and practice of the courts of equity, of all cases arising under these proceedings, and of all questions arising out of railroad mortgages, and may in a summary manner remove any trustee under a railroad mortgage, whether such trustee is in possession of the railroad or not, and appoint a new trustee in his stead, whether such trustee is elected by the bondholders or creditors as provided by statute or not.

381. Rhode Island.[1]—Whenever any railroad corporation mortgages or conveys in trust its railroad or railroad property, or any part thereof, to trustees, for the security of its bondholders or other creditors, or for the security of any class of such bondholders or other creditors, and such trustees take possession of any railroad or railroad property, in pursuance of any authority contained in their mortgage or deed of trust, and take charge of, and operate, such railroad or railroad property for the benefit of the creditors for whom such trust was created, such trustees having the assent of the bondholders are not personally liable for any cause or injury arising from the operation of such road, or while they may operate the same, except for their wilful mismanagement, or for any contracts made by them as such trustees; but all such railroad property, the bondholders having assented thereto, is liable for the acts and proceedings of such trustees in the execution of their trusts, to the extent of the interest of the said trustees of the bondholders or creditors for whose benefit such trustees may act; and any action or other proceeding therefor must be brought against such trustees, describing them as such.

382. In Connecticut,[2] it is provided by statute that when any railroad company has mortgaged its property, or any part thereof, to any person, in trust, for the security of its creditors, or for the security of any class of them, and has made default in the payment of principal or interest, due to such creditors, any such creditor may prefer his petition to the Superior Court, in any county in which such railroad, or any part thereof, is located, setting forth such fact, and praying that such trustee may be placed in the possession of such property, for the benefit of such creditors; and such petition is heard and determined at the first term of the court to which it is returnable, unless continued for reasonable cause; and if the allegations therein are found true, such court decrees that the said company and its president and directors, under a suitable penalty, shall surrender such mortgaged property to the trustee, for the benefit of such creditors.

When any such trustee has taken possession of any property, in pursuance of an order of court, or in pursuance of any authority contained in the mortgage or deed of trust, he takes charge of, and operates such railroad, or railroad property, for the benefit of

[1] G. S. 1872, ch. 167, § 11.

[2] G. S. 1875, pp. 333, 334.

the creditors for whom such trust was created, and is not personally liable for any cause or injury arising from the operation of such road, or while he may operate it, except for his wilful mismanagement, or for any contracts made by him as such trustee; but all such property is liable for the acts and proceedings of such trustee, in the execution of his trust, to the extent of the interest of the creditors, for whose benefit he may act; and any proceeding, for the purpose of making said property liable, must be brought against such trustee, describing him as such.

The trustee is required to file an inventory of the property taken possession of in the office of the secretary of state; where also he is required to file quarterly accounts of the moneys received and paid by him in the course of his agency. He is authorized to proceed at his discretion in the Superior Court in any county in which the railroad, or any part of it, is located, to foreclose for the use of the bondholders, or other creditors for whom he acts; and the court may limit the time for the redemption of the mortgaged property, as in ordinary proceedings for the foreclosure of real property. The trustee may be removed for cause, such as neglect or delay in the performance of his duties, and a new one appointed in his place.

The rights of prior incumbrancers are not affected by these proceedings. A trustee in possession has the same rights, powers, and privileges as are conferred upon railroad companies; and all expenses and damages incurred in good faith to improve the road are reimbursed from the earnings of the road. All reasonable expenses of the trustee, and damages for injuries sustained during the time of his trust, and payments of prior incumbrances which have matured, and also a reasonable compensation to be allowed by the court, are deducted from the earnings of the road before any part is paid to the creditors.

CHAPTER XII.

PAYMENT AND REDEMPTION.

I. Stipulation for payment in gold or currency, 383, 384.
II. Changes in form and amount of debt, 385–388.
III. Payment of lost bonds, 389.
IV. Subrogation, 390–394.
V. Redemption, 395–397.

I. *Stipulation for Payment in Gold or Currency.*

383. It is well settled that a provision for the payment of bonds or coupons in gold coin is valid, and may be enforced.[1]

The State of Alabama, by an act of its legislature in 1867, authorized its governor "to indorse in behalf of the state the first mortgage bonds of any railroad company in the state having completed and equipped twenty continuous miles of railroad, at the rate of $12,000 per mile, for each section so completed and equipped." The bonds of the company bearing interest at a rate not exceeding eight per cent., so indorsed by the governor, are declared to have priority in favor of the state over any and all other liens whatsoever. The Montgomery and Eufaula Railroad Company took advantage of this act, but did not execute any trust deed or mortgage of its property to secure its bonds, the state relying upon its statutory lien. The indorsement by the governor referred to the act providing for it as his authority. The company having defaulted its interest, the holders of a part of the bonds brought a suit in behalf of themselves and all other bondholders who might come in, praying that they might be subrogated to the lien and rights of the state upon the property of the company, that the lien might be established and the property and franchise of the company sold. It was, however, claimed that the indorsement was void, and consequently that there was no statutory lien, because while the statute only authorized the indorsement of bonds bearing eight per cent. interest, the bonds issued and indorsed in

[1] Trebilcock *v.* Wilson, 12 Wall. 687; Pollard *v.* City of Pleasant Hill, 3 Dill. 195; State of Missouri *v.* Hays, 50 Mo. 34. See 2 Jones on Mortg. § 901.

this case bore eight per cent. interest in gold; that the agreement to pay the interest in gold was an agreement to pay more than eight per cent. interest. But the court held the fair construction of the statute to be that the interest might be made payable in any legal tender currency; and that whether gold might be at a premium or at a discount in respect to the treasury notes of the United States was immaterial, as both are equally lawful money.[1]

384. Under the legal tender acts, an undertaking to pay in gold must be either express or implied from the contract; the implication cannot be gathered from the mere expectations of the parties.[2] The State of Maryland, having a large interest in the Baltimore and Ohio Railroad Company, to enable it to finish its road, loaned it sterling bonds of the state, with interest at five per cent. per annum, payable in London. This interest the state was, of course, obliged to pay in gold. The railroad company, by way of indemnity, agreed to pay interest to the state out of the profits of the road at a specified rate, and in parts of the contract it appeared that a complete indemnification was specifically and carefully provided for. At the time the contract was made, there was no difference existing or anticipated in the value of currency and coin, but after the passage of the legal tender acts, the interest which the railroad company stipulated to pay, if paid in legal tender notes, would fall very much short of indemnifying the state for its payment of the interest upon its bonds in gold. The question, therefore, arose whether, by the contract between the parties, the state was entitled to demand in gold what was payable to her, or whether it might be satisfied in legal tender notes. The Supreme Court of the United States held that no implication of an undertaking to pay in gold could be drawn from the fact that unless the contract should be so interpreted there was no complete indemnification of the state.[3]

II. *Changes in Form and Amount of Debt.*

385. A change in the form of the mortgage debt, such as the substitution of new bonds for those originally secured by it,

[1] Young *v.* Montgomery & Eufaula R. R. Co, 2 Woods, 606. And see Butler *v.* Horwitz, 7 Wall. 258; Meyer *v.* City of Muscatine, 1 Wall. 384, 391.

[2] Knox *v.* Lee, 12 Wall. 457.

[3] Maryland *v.* Railroad Co. 22 Wall. 105.

does not extinguish or affect the lien.[1] A railroad company having executed a mortgage to secure a limited amount of bonds, afterwards executed another mortgage of the same property to secure a larger amount of bonds, and the deed recited that the holders of the bonds secured by the original mortgage had agreed to surrender the same, and receive in their place new bonds to be secured by the original mortgage as modified by the second mortgage. Accordingly, all the bonds secured by the first mortgage, except twenty, were exchanged for bonds secured by the second. Upon the foreclosure of this mortgage, the holders of these twenty bonds claimed to have priority over all the new bonds issued to take up the original bonds, and that they should be paid in preference out of the proceeds of the sale. They based their claim upon the theory that the new bonds issued in lieu of the original bonds were in no way secured by the original trust deed, but were a lien upon the property only by virtue of the second deed. But the court declared that the provisions of the latter deed clearly revealed the purpose of the parties, that the bondholders surrendering their original bonds for the new ones should not lose any right or estate granted by the first deed, except so far as that was modified by the second; and that the bondholders consented to give up their old bonds and take the new ones upon this express condition; and therefore, the court held that the holders of these twenty bonds were not entitled to be paid out of the proceeds of the sale in preference to the holders of the substituted bonds; but that they could not be prejudiced by the increase of the number of bonds secured by the second mortgage, and consequently were entitled to the same proportion of the proceeds of the mortgaged property that they would have had if the second mortgage had not been executed.[2]

386. **When the amount of a mortgage is limited to a definite sum this cannot be enlarged** either by the mortgagor, or by the trustees of the bondholders, or by a court of equity, so as to make it security for an additional sum. The La Crosse and Milwaukee Railroad Company executed a mortgage to secure $4,000,000 of its bonds which were all issued. Upon a foreclosure of the mortgage, many of the bonds having been issued at

[1] Stevens *v.* Mid-Hants Ry. Co. L. R. Ch. App. 1064.

[2] Ames *v.* N. O., Mobile & Texas R. R. Co. 2 Woods, 206.

a large discount, a decree was entered for only the amount which had been actually given for the bonds, namely, about $2,800,000. A party, who had sold to the company a large amount of railroad iron and had received in payment for it bonds at eighty per cent., with an agreement that if the company should at any time sell other bonds at a less rate, he should have as many additional bonds as would pay him for the iron in full, estimating the bonds already given and those to be given at the lowest rate at which any bonds had been sold, claimed that inasmuch as the company had sold bonds at forty per cent., he had a right to have his outstanding equity with the company adjusted in the foreclosure suit, and his demand attached to the mortgage. His petition was, however, denied by the Supreme Court of the United States; and Mr. Justice Davis, delivering the opinion of the court, and stating the reasons for not adjusting his claim in this way, said:[1] "To do this, there must be a power somewhere to enlarge the mortgage, and where is it lodged? Certainly not with the trustees, for their duty is to see that the security held by them for their *cestuis que trust* is enforced according to the terms of the deed. They could neither enlarge the mortgage, nor consent to its enlargement. The court could not do it, nor the La Crosse Company, as it had covenanted with the trustees in behalf of the bondholders that it would only issue four millions of dollars in bonds. The rights of the bondholders were fixed by the terms of the mortgage. The value of the bonds as an investment depended in a great measure on the number to be issued, and, doubtless, each purchaser before he bought had information of the character of the security on which he relied. The property might be very well a safe security for four millions of dollars, and very unsafe for any additional amount. The doctrine contended for would utterly destroy the marketable value of all corporate securities. No prudent man would ever buy a bond in the market, if the provisions made for its ultimate redemption could be altered without his consent. But it is said, as the court rendered a decree for less than the face of the bonds, equity will step in and allow the appellant to apply the vacuum of principal secured by the mortgage to liquidate his claim. The answer to this is, that it does not concern the appellant whether the court rightfully or otherwise reduced a portion of the bonds. The bondholders,

[1] Vose *v.* Bronson, 6 Wall. 452.

whose bonds were thus reduced, are the only parties in interest who could have just cause of complaint against the action of the court, and if they did not feel aggrieved, no other person has any right to complain. The security of the mortgage extended to four millions of bonds only, and whatever amount the court should ascertain was due on those four millions was the amount secured, and no more."

387. **The debt secured cannot be increased as against subsequent incumbrancers** without their consent.[1] The trustees of a subsequent mortgage could not bind the bondholders by giving such consent, nor would the consent of a majority of the bondholders bind the minority. Any one bondholder can insist upon his right that the prior incumbrance shall remain unchanged.

The Atlantic and Great Western Railway Company, incorporated under the laws of the States of Ohio, Pennsylvania, and New York, and owning a railway extending through portions of each of these states, made a first mortgage of the division of its road situate in Ohio, and afterwards a second mortgage of all its property situate in the three states. Under the latter mortgage a foreclosure suit was brought in each of the three states. An agreement was afterwards made between the trustees of the first mortgage sanctioned by a majority of the bondholders under it, with the trustees of the second mortgage, extending the time of payment of the first mortgage for three years, and changing the interest payable during such extended term from currency to gold. This agreement expressly provided that it was not to take effect until it was confirmed by the courts in each of the three states. It was confirmed in Ohio, but when it was presented for confirmation to a judge of the Supreme Court of New York, he held that he had no power to sanction any change in the effect or terms of the first mortgage.[2] "The court has no authority which would permit it to take that difference (between interest in currency and in gold), for a period of three years, from the holders of the second mortgage bonds and give it to the more fortunate owners of the first, against the objections of those resisting the proceeding. The same principle which would sanction a small increase of the prior incumbrance would sustain one which might

[1] See 1 Jones on Mortgages, §§ 357, 361.

[2] Taylor v. Atlantic & Great Western Ry. Co. 55 How. (N. Y.) Pr. 275.

prove entirely destructive to those designed to be protected by the succeeding incumbrance; and if the court had the power over the agreement of the parties to change it in any material respect it could entirely destroy its value. The point involved is one of principle solely, for if the power exists it can be limited in its application only by the subject to be affected by it. Every bondholder is equally entitled, by the agreement made with him and with the trustees for his benefit, to be protected in all the advantages legally secured by it; and for that reason the courts cannot disregard the principle protecting him, because the amount due to him and the extent to which he may be entitled to participate in the advantages of the security may be, comparatively speaking, not very significant. It is enough that a material right may be prejudiced, and the party deprived of the full advantage of his contract and security, to require that the court shall not interpose to his manifest injury; and such a right has been clearly shown in this case."[1] It may be observed, moreover, that no confirmation of such agreement could give it any validity as against a bondholder who did not himself consent to it.

388. An extension of the time of payment of a prior mortgage does not impair the security of subsequent incumbrancers.[2] A change in the time of payment of the interest of the prior mortgage, so long as the rate is not increased, does not have this effect. Thus, a trustee under a railroad mortgage, being about to apply for an order to sell the property under the mortgage, a receiver in possession of the property, in behalf of second mortgagees, agreed to pay the interest quarterly instead of semi-annually, and thus obtained an extension of the mortgage. A holder of receivers' certificates, which were by agreement and order of court made a lien subject to the first mortgage, could not object to the payment of the interest as agreed.[3]

[1] Per Daniels, J., in Taylor *v.* Atlantic & Great Western Ry. Co. *supra*. An injunction against the carrying into effect of this agreement was granted by another judge of the same court, and continued *pendente lite*. Reinach *v.* Meyer, 55 How. (N. Y.) Pr. 283.

[2] 2 Jones on Mortgages, § 942.

[3] *In re* United States Rolling Stock Co. 55 How. (N. Y.) 286.

III. *Payment of Lost Bonds.*

389. The loss of a bond is no objection to the payment of it by the company that issued it, provided proper indemnity be furnished against its being enforced in the hands of others.[1] Relief is given in equity. Equity jurisdiction in the case of lost bonds originates in the doctrine of profert at common law, it being a rule of pleading in the common law courts, that they could give no remedy for a debt secured by bond unless the creditor offered to produce his bond in court. If the bond were lost, profert was impossible, and the remedy at law was gone. A court of chancery, however, on proof that the bond was lost, entertained jurisdiction to compel its reëxecution and payment of the money secured. Now, although profert is dispensed with the equity jurisdiction survives.[2]

Relief for the loss of negotiable bonds will only be given upon the condition that full and secure indemnity be given against all risk. The difficulty of securing full and complete indemnity to meet all the contingencies that may occur when the bonds have a very long time to run, may be great, but it does not prevent the granting of the relief. The court has full control of the matter. Indemnity should be furnished upon each payment of interest, as well as upon the payment of the principal sum; and then, if at any time before final payment, it be made to appear that the indemnity for past payments was insufficient, or had become insecure, the court might properly make it a condition precedent to the receipt of further payments that additional indemnity be given in respect to payments previously made. With proper precaution all risk may be provided against; and if the bonds should be discovered, or be presented by a *bonâ fide* holder, of course, the obligations issued in their place will cease to be of value.[3]

IV. *Subrogation.*

390. Subrogation arises by operation of law, as a general rule, whenever the mortgage debt is paid by one entitled to redeem, other than the debtor. It is an equitable right, and of

[1] Miller *v.* Rutland & Washington R. R. Co. 40 Vt. 399. See § 219.

[2] New Orleans, Jackson & Great Northern R. R. Co. *v.* Miss. College, 47 Miss. 560; and see Lawrence *v.* Lawrence, 42 N. H. 109.

[3] Chesapeake & Ohio Canal Co. *v.* Blair, 45 Md. 102.

course there is no chance for its operation when there is a legal right to the security, such as exists when a legal assignment of the security is taken by the person paying the mortgage debt. Subrogation proceeds upon the theory that the mortgage debt has been paid, and paid by one who has a right to redeem, and under circumstances which entitle him, as an equitable assignee of the security, to hold it as a subsisting charge upon the property. It does not matter whether the creditor who pays such debt does so voluntarily or for his own protection. It is an essential condition, however, of his right to substitution that he is himself under no obligation to pay such debt; that it is not in any way a debt of his own. This principle is often available for the protection of one who has paid off an incumbrance upon property to which he erroneously supposed he had good title, enabling him, upon the failure of his title to the equity of redemption, to hold the mortgage title as an equitable assignee.[1]

391. Relief can be had by one who has paid a prior mortgage under the belief that he had good title to the mortgaged property only when he has made the payment under a mistake of fact, and when he has not acted in bad faith towards any parties interested in the property. The La Crosse and Milwaukee Railroad Company, having made a first and second mortgage, was sold on execution at the suit of certain creditors, and was bought in by the bondholders secured by the second mortgage. The purchasers, as they were authorized to do by statute, organized themselves into a new corporation, and worked the road for their own profit. Subsequently the mortgagees under the senior mortgage pressed their claim to a decree of foreclosure, when the new corporation, in order to prevent a sale, paid into court the amount of the decree, and the money was distributed among the bondholders. A bill was then pending against the new corporation in behalf of certain judgment creditors of the La Crosse and Milwaukee Railroad Company, alleging that the sale under which the new corporation claimed was fraudulent and void, and praying that it might be set aside; and a decree was afterwards made in accordance with the prayer, and directed that the property should be resold, and the proceeds applied, after payment of prior liens, to the satisfaction of the judgments on which the creditor's bill was

[1] See Jones on Mortgages, §§ 874–885.

founded. The new corporation then filed a bill in equity against the mortgagees under the first mortgage, asking to have the money returned to them on the ground that it had been paid under a mistake of fact, or as an alternative relief to be subrogated to the benefit of the first mortgage; but the Supreme Court of the United States held that the bill would not lie for either form of relief.[1] Mr. Justice Bradley, delivering the opinion of the court, said: "The bare statement of the claim, even presenting it in the language of the bill itself, seems to us sufficient to condemn it. Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a court of equity. By the civil law, the possessor, even in bad faith, may have the value of his improvements, if the real owner choose to take them. The latter has an option to take them or to require their removal. But this rule has never obtained in the common law, nor in the system of English equity. One of the maxims of the latter system is, 'He that hath committed iniquity shall not have equity.' And various illustrations of it are furnished by the books. But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse and Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good as against all the world. The property was theirs; but by reason of the fraudulent sale was subject to the incumbrance of the debts of the La Crosse Company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incum-

[1] Railroad Company *v.* Soutter, 13 Wall. 517. Chief Justice Chase and Justices Miller and Field dissenting. See, for previous stages of the litigation, Bronson *v.* La Crosse R. R. Co. 2 Wall. 283; James *v.* Railroad Co. 6 Wall. 752.

brance on their own property when they paid into court the money which they are now seeking to recover back. They are wrong also in asserting that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law. They mistook the legal effect of transactions of which they were chargeable with notice. They were the persons for whose benefit the purchase was made, which was declared to be fraudulent. They were the principal defendants in the creditors' bill upon which this decree was rendered. All the evidence in that suit had been taken when they made the payment in question. The cause was pending, on appeal, in this court. There was not a fact, therefore, of which they were ignorant. They had full and actual notice of all the transactions, and all the evidence on which the decree was ultimately founded." Moreover, as against those who had in the mean time purchased the property, under the proceedings had in favor of the judgment creditors, there would be no equity in subjecting the property to an incumbrance from which it was free when their purchase was made.

392. Subrogation to rights of a state. — The holders of bonds of a railroad company which a state has indorsed under a statute giving a lien upon the company's property as security, may upon a default of the company be subrogated to the rights of the state in respect to this security, and may in a suit to enforce the lien obtain a sale of the property and application of the proceeds to the payment of the bonds.[1]

Although bondholders who have purchased bonds of a railroad company indorsed by a state may be subrogated to a mortgage taken by the state for its security, after the state has repudiated its indorsement as illegal, yet there can be no such subrogation by one who has taken the bonds without such indorsement, but issued to an officer of the company as collateral security for advances by him.[2]

393. The difficulty in the way of subrogation to the security taken by a state is illustrated in a recent case before the Circuit Court of the United States for the Fifth Judicial Circuit.[3]

[1] Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606.

[2] Clews *v.* Brunswick & Albany R. R. Co. 54 Ga. 315.

[3] Branch *v.* Macon & Brunswick R. R. Co. 2 Woods, 385.

The State of Georgia, under the authority of an act of the legislature passed in 1866, indorsed the bonds of the Macon and Brunswick Railroad Company, to the amount of ten thousand dollars per mile, upon the express condition that such indorsement should vest in the state the title of all property purchased with the proceeds of said bonds, and should give the state a first lien on all the property of the company; and that upon failure of the company to pay the interest or principal of the bonds, the governor should take possession of all its property and sell the same for the purpose of paying the bonds. Bonds to the amount of $1,950,000 were issued and indorsed by the state in accordance with this act. In 1868, the people of the state adopted a Constitution, by which it was provided that the credit of the state should not be granted or loaned to aid any company, except under certain conditions. In 1870, the legislature passed an act amending the Act of 1866 above referred to, so as to authorize the governor to indorse the bonds of the company to the extent of three thousand dollars per mile in addition to the ten thousand first authorized. Under the latter act the company issued bonds which were indorsed by the state to the amount of $600,000. Two years afterwards the legislature, by resolution, declared the state's guaranty on these bonds binding upon the state. In 1873, the interest on the bonds not having been paid, the governor seized and took possession of the railroad on behalf of the state, and appointed an agent or receiver to manage it. In 1875, the legislature passed a resolution, declaring the first issue of bonds valid and binding on the state, but the second issue of $600,000 unconstitutional, null, and void, and also declaring that the road ought to be sold. Accordingly, the governor caused the road to be advertised for sale, whereupon a holder of bonds of the last issue filed a bill, in which he prayed for an injunction to prevent the sale, and asked for the appointment of a receiver to take possession of and sell the road under the direction of the court; but the court refused this relief, because it could not be granted without adjudicating the rights of the state, which ought not to be done unless the state were a party, and the state could not be made a party. Mr. Justice Bradley, delivering the opinion of the court, said: "The great difficulty in this case arises from the fact that the surety is the State of Georgia, and that the state is, by its agents and officers, in possession of the property given by way of indemnity. In

order to effect the object of this bill, the state must not only be displaced and the bondholders subrogated in its stead, in reference to the property in question, but the courts must dispossess the state of the actual possession of that property. . . . . The court is called upon, therefore, to adjudicate directly upon the state's liability on the guaranty without having any jurisdiction over it as a party, and having decided in favor of that liability, it is then called upon to dispose of the fund which the state has taken for its indemnity. The case, therefore, involves a direct adjudication of the rights and liabilities of the state, and an ultimate execution of property in its possession, the state, at the same time, denying its liability and insisting upon its right to maintain its lawfully acquired possession. It seems to us that this is asking the court to go further than any court has ever gone yet, except where legislation has been adopted authorizing the state to be sued in the same manner as a private party. At all events the right of the complainant is, to our view, so doubtful that we do not feel authorized to exercise the extraordinary powers of this court sought to be put into operation. Without attempting, therefore, to point out to the complainant what other remedy he has, except to rely upon the good faith of the State of Georgia, we feel compelled to deny the motion for an injunction and appointment of a receiver."

394. But there can be no subrogation as between a state which has issued its own bonds to a railroad company to aid its construction, and a holder to whom the company has transferred the bonds. The state is then the principal debtor, and primarily liable, and the holder of such bonds cannot on the principle of subrogation claim to have lands conveyed to the state as security against loss upon such bonds applied to the payment of the bonds held by him. The State of Minnesota issued its bonds to the Southern Minnesota Railroad Company, which transferred to the state as security certain lands it had received, as a grant in aid of the construction of the road, and also executed a first mortgage of all its property. The company partially graded and constructed its road, and received bonds from the state, nearly all of which, amounting to half a million dollars, it transferred to a contractor who had built the road. The company made default under its mortgage to the state, which foreclosed the mortgage, and

purchased the property at the sale. Several years afterwards, the state transferred to a new corporation the property acquired under the foreclosure, together with the lands conveyed to it by the original company. The state, however, directly after the default of the Southern Minnesota Railroad Company, proved recreant to its good faith and honor by refusing to pay the interest or principal of its bonds. The contractor, after a delay of twelve years, brought a bill in equity against the new corporation, which had then completed the road, seeking to charge the lands in its possession before mentioned with the payment of the bonds. The Supreme Court of the United States decided that he had no equity which could be enforced, and that if he had had any such equity, his long delay in presenting the claim would deprive his suit of favorable consideration.[1] Mr. Justice Field said: "Whatever right the plaintiff had to compel the application of the lands received by the state to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law, or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a Court of Chancery against the surety. But the state being the surety here, it could not be enforced at all, and not being a specific lien upon the property, cannot be enforced against the state's grantees. Where property passes to the state, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the property comes under their jurisdiction and control. Thus, if property held by the government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the court to enforce the mortgage would attach, as it existed previous to the acquisition of the government. But where the property is not affected by any specific lien or trust, in the hands of the state, her transfer will pass an unincumbered estate."

V. *Redemption.*

395. It is not often that the subject of the right of redemption from foreclosure sales under railroad and other corporate mortgages is a matter of litigation in the courts. Especially when a railroad company has become so embarrassed as to allow

[1] Chamberlain *v.* St. Paul & Sioux City R. R. Co. 92 U. S. 299.

its property to be sold to satisfy a mortgage upon it, there is generally nothing worth redeeming, even if the corporation, or any assignee or creditor of it, should be in condition to effect a redemption requiring such a large sum of money as railroad mortgages usually represent. There are general laws in several states allowing redemption after foreclosure sales, but they are not generally applicable to sales made by virtue of powers in trust mortgages, such as railroad mortgages usually are, although they may be applicable to sales under such mortgages when they are enforced by a bill in equity.[1] These statutes relating to redemption become a part of the contract of mortgages affected by them, made while the statutes are in force; they confer substantial rights, and become a rule of property, binding upon the federal courts sitting in equity in states where such statutes exist; and the federal courts must conform to such statutes in decrees foreclosing mortgages affected by such rights of redemption.[2]

But it seems that such statutes are not binding upon the federal courts when they are called upon to decree a foreclosure sale of a railroad mortgage which covers as an entirety the rights, franchises, and road of the company existing in several states. This was the view taken by Mr. Justice Harlan of the Supreme Court, holding a recent term of the Circuit Court for the Seventh Circuit. In the Indianapolis, Bloomington, and Western Railway case a final decree of sale was rendered in 1877. The sale had not taken place when the Supreme Court of the United States decided the case of *Brine* v. *Insurance Company*, where it was held, as to a lot of land in Chicago which had been mortgaged, that the right of redemption within fifteen months given by the Illinois statute was part of the contract which the federal court was bound to recognize. In the Indianapolis, Bloomington, and Western case the decree had directed the sale of the railroad property, rights, and franchises, as an entirety without redemption, and a motion was made to correct the decree, so as to recognize the right of redemption given by the statutes of Indiana and Illinois in sales of real estate. Mr. Justice Harlan decided that the redemption statutes of Indiana and Illinois did not embrace railroad mortgages which covered as an entirety the property, rights, and franchises of a railroad, and that the original decree should

[1] See Jones on Mortgages, chapters xxii., xxix., xxx.

[2] Brine *v.* Insurance Co. 96 U. S. 627.

stand. These views, he held, were not at all in conflict with the case of *Brine* v. *Insurance Company*, or with any decision in the Indiana and Illinois Supreme Courts.[1]

396. A vested right to redeem under the general law cannot be destroyed or impaired by a special statute enacting that the mortgage has been foreclosed, or that it shall be foreclosed in case the debt be not paid within one year from the passage of the act.[2]

397. In New York[3] it is provided by statute that whenever default shall be made by any railroad or plank road company in the payment of principal or interest of any bonds of such company, which are secured by a mortgage of the property of such company, it shall be lawful for each and every stockholder of said company, at any time during the process of such foreclosure, to pay to the mortgagees named in such mortgage, for the use and benefit of the holder and holders of such bonds, such a proportion of the sum due and of the sum secured to be paid by the whole of the bonds secured by such mortgage, as such stockholder's stock shall bear to the whole stock of said company; and on so paying such stockholder shall, to the extent of such payment, become and be interested in said mortgage and protected thereby.

In case of the foreclosure of any mortgage given by any railroad or plank road company to secure the payment of any bond of such company, any stockholder of such company shall, for the period of six months after the sale under such foreclosure, have the right, on paying to the purchaser or purchasers at or under such sale, or to the mortgagees in such mortgage, for the use and benefit of said purchaser or purchasers a sum equal to such proportion of the price paid on such sale, and the costs and expenses thereof, as such stockholder's stock in said company shall bear to the whole capital stock of said company; and on so paying such stockholder shall be entitled to have the same relative amount of stock or interest in said rail road or plank road company, and its road, franchises, and other property.[4] It shall be lawful for any mortgagee

[1] Boston Daily Advertiser, October 9th, 1878. Judges Drummond and Blodgett concurred.

[2] Ashuelot R. R. Co. *v.* Elliot, 52 N. H. 387.

[3] 2 R. S. 1875, p. 553, § 108. Original Act, Laws 1853, c. 502.

[4] 2 R. S. 1875, p. 553, §§ 109, 110.

of any railroad and the franchises thereof to become the purchaser of the same, at any sale thereof under the mortgage, upon foreclosure by advertisement, or under a judgment or decree, or otherwise, and to hold and convey the same, with all the rights and privileges belonging thereto or connected therewith.[1]

[1] 2 R. S. 1875, p. 553; Laws 1857, c. 444, § 1.

CHAPTER XIII.

REMEDIES AND JURISDICTION OF COURTS FOR ENFORCEMENT OF CORPORATE SECURITIES.

I. The several remedies to enforce corporate securities are cumulative, 398–405.

II. Jurisdiction of state and federal courts of suits against corporations, 406–414.

III. Effect of consolidation of railroad corporations upon the jurisdiction of suits against them, 415–420.

IV. In cases of concurrent jurisdiction the court which first assumes jurisdiction retains it, 421, 422.

V. Sale of franchise or property of railroad company on execution, 423–430.

I. *The Several Remedies to enforce Corporate Securities are Cumulative.*

398. General Statement. — Although for the reasons stated mortgages by railroad companies, and other corporations having property of great value widely scattered, are almost always foreclosed by suits in equity, yet other methods of foreclosure are not wholly disused. Thus, in Massachusetts, such mortgages have been foreclosed by writ of entry and possession;[1] and in Maine by notice and possession in the manner used for the foreclosure of ordinary mortgages.[2]

The general rule, that the several remedies upon a mortgage by suits at law and in equity, and by entry and possession, may be used together or successively,[3] is applicable to mortgages by railway companies.

A holder of bonds issued by a railroad company and guaranteed by the trustees of an internal improvement fund acting in behalf of a state, and having a statutory lien upon the railroad as security, on the default of the company, has three remedies: first, upon the personal liability of the company; second, upon the guaranty of the internal improvement fund; and, third, upon the

[1] Haven *v.* Grand Junction R. R. & Depot Co. 12 Allen (Mass.), 337.

[2] Kennebec & Portland R. R. Co. *v.* Portland & Kennebec R. R. Co. 59 Me. 9.

[3] 2 Jones on Mortgages, § 1215.

statutory lien on the railroad. He cannot avail himself of the latter directly, as he could if it were a mortgage given to secure the bonds alone; but he must induce the trustees to act in the mode pointed out by the statute; or compel them to act by mandamus; or he may seek relief by a bill in equity.[1]

399. Although a mortgage itself provides no remedy other than a power of sale, the jurisdiction of a court of chancery to enforce it is not ousted. The power of sale is only a cumulative remedy.[2] Although a mortgage provides several remedies, as for instance that the mortgagee may, upon default, take possession and apply the income of the property to the payment of the debt secured, or may sell the property under a power, or may enforce payment of the debt by suit at law, or may enforce the security by proceedings in equity, the mortgagee is not confined to any particular order of priority in resorting to one or all of the remedies conferred by the mortgage.[3]

Whether a provision in a mortgage making a sale by the trustees under the power given them, exclusive of all other methods of sale, would exclude a resort to proceedings in equity by bondholders for that purpose, is perhaps an undecided question; but a suit at law upon overdue coupons has been sustained,[4] although the mortgage securing them prescribed that in case the coupons were not paid when due, the trustees, at the request of one fourth of the bondholders, should enter into possession of the railroad, and sell it for the benefit of the creditors; "it being further expressly understood and agreed (any law or usage to the contrary notwithstanding) that neither the whole nor any part of the property . . . . shall be sold under proceedings either at law or in equity for the recovery . . . . by the holder or holders of the bonds . . . . of the whole or any portion of the principal or interest of the said bonds, it being the intention and agreement of the parties, for the better securing of the largest possible price, ... that the method of sale hereinbefore provided shall be exclusive of all others."

In Pennsylvania the courts formerly had no general jurisdiction

[1] State of Florida *v.* Anderson, 91 U. S. 667.

[2] Jones on Mortgages, § 177; Eaton & Hamilton R. R. Co. *v.* Hunt, 20 Ind. 457.

[3] McAllister *v.* Plant, 54 Miss. 106.

[4] Widener *v.* R. R. Co. 1 Weekly Notes of Cases, 472.

in equity, and therefore, until a recent statute [1] gave such jurisdiction in cases of corporation mortgages, there could be no decree for the sale of mortgaged property at the instance of the mortgagee.[2] A power of sale in such a mortgage might be executed according to the terms of the appointment; but the court could not direct the execution of it except at the suit of a party standing in the relation of *cestui que trust*, and for the purpose of administering the trust.[3] Now the Supreme Court may decree a sale under a railroad mortgage, and the act giving the court jurisdiction in such case applies to mortgages made before its passage, as it merely provides a new remedy for a breach of contract.[4] When the mortgage creates a trust, and provides that a power of sale may be executed by the trustee on certain contingencies, the court may in equity control and regulate the exercise of the power at the suit of a *cestui que trust;* and when it has once decided that the contingency has arisen to give it jurisdiction, its decision cannot be impeached collaterally.[5]

400. **Suit at law upon the bonds.** — The fact that a railroad mortgage empowers the trustees, upon the written request of not less than $100,000 in amount of the bonds secured, after breach of the condition, to sell the property, is no defence to a suit at law upon the bonds after a breach of the condition. The bonds are the principal debt, and the mortgage is only an incidental security. The remedies at law and in equity do not clash and destroy each other, but exist together.[6]

401. **Recovery of possession.** — A court of equity has jurisdiction to order a specific performance of a stipulation in a railroad mortgage, authorizing the trustees to take possession of the mortgaged property for the non-payment of the bonds secured, and a bill in equity is the proper form of proceeding to compel the company and its agents to deliver possession to the trustees.[7] When

[1] April 11, 1862, 1 Brightly's Purdon's Dig. 593.

[2] Ashhurst *v.* Montour Iron Co. 35 Pa. St. 30.

[3] Bradley & Chester Valley R. R. Co. 36 Pa. St. 141.

[4] McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189; McCurdy's Appeal, 65 Pa. St. 290.

[5] Youngman *v.* Elmira & Williamsport R. R. Co. 65 Pa. St. 278.

[6] Philadelphia & Baltimore Central R. R. Co. *v.* Johnson, 54 Pa. St. 127. The action in this case was upon six bonds amounting together to $1,400.

[7] Shepley *v.* Atlantic & St. Lawrence R. R. Co. 55 Me. 395; Shaw *v.* Norfolk County R. R. Co. 5 Gray (Mass.), 162.

foreclosure is sought by a bill in equity, delivery of possession to the trustees or to a receiver is obtained by the same bill; and a separate bill for this purpose is necessary only when foreclosure is sought by some other method, such as a power of sale, or by entry and possession.

Liens are enforcible in equity only, unless the law has provided for another mode. This is true of vendors' liens, equitable and other mortgages, and all statutory liens, except in all cases where the lien is in the nature of a pledge, and possession accompanies the lien. A court of law does not possess the means of enforcing such liens.[1]

A power in a mortgage authorizing the mortgagee, upon default of payment, to take possession of the railroad and the property connected therewith, and use or sell the same, must be exercised upon all the property mortgaged as an entire thing; and it does not authorize the mortgagee to take possession of particular portions of the property, leaving the residue in the possession of the corporation. If this could be done the road might be rendered useless to both creditors and stockholders; and what is of greater importance, neither the mortgagee nor the corporation would be able to discharge the public obligation to use the road as a highway for which the charter of the company was granted. Therefore the mortgagees of a railroad have no authority, before taking possession of the entire property, to replevy a portion of the mortgaged property from an officer who has levied an execution upon it.[2]

The mortgagee in such case stands upon no higher ground in respect to an officer who has legally levied an execution upon the property than the corporation itself. The mortgagee must either take possession of the whole property, or obtain an injunction against the sale and removal of the property levied upon. But when the mortgage debt exceeds the value of the property covered by the mortgage, the whole equitable interest in the property is in the mortgagee, and consequently a creditor acquires no substantial interest by a levy upon a portion of the property; and in such case, although the mortgagee has in vindication of his rights recovered in replevin the property levied upon, yet the creditor is entitled only to nominal damages.[3]

[1] Cairo & Vincennes R. R. Co. *v.* Fackney, 78 Ill. 116.

[2] Coe *v.* Peacock, 14 Ohio St. 187.

[3] Coe *v* Peacock, *supra.*

402. A threatened injury to mortgaged property may be restrained by injunction. Thus, the receivers of a railway appointed in a suit for the foreclosure of a mortgage upon it were allowed this relief against another railway company, which threatened to lay their track on a part of the mortgaged premises, and thereby inflict a serious damage, without allowing compensation, although they claimed the right to do so by virtue of an agreement made with the mortgagors or their grantees. The agreement, however, was made subsequently to the mortgage, and therefore could not affect the rights of the mortgagees under it.[1]

The possession of mortgage bonds, and their production in the cause, is sufficient to give the holder a standing in court and entitle him to relief by injunction against the interference with the mortgage property by a judgment creditor. It is no valid objection that he has pledged some of the bonds to other persons as collateral security, for he has not thereby lost his title as owner. Being a bondholder entitled to priority over a judgment creditor he is entitled, in the absence of any action by the mortgage trustees, to maintain for himself and all other bondholders a suit to restrain such judgment creditor from enforcing his execution.[2]

The owner of bonds secured by a lien upon the lands of a railroad company may bring a suit to enjoin another corporation from obtaining such lands by the wrongful use of the name of the corporation whose bonds he holds. It should first appear, however, that the company had refused to take proper measures to protect its corporate rights.[3]

403. A general creditor of a corporation cannot obtain an injunction against its executing a mortgage of its property. If the claim be a lien upon the property, in the form of an attachment, judgment, execution, or otherwise, this will not be affected by a subsequent mortgage ; and if it be not a lien by reason that the company is a foreign corporation, and is beyond the jurisdiction of the court, the mortgage, if executed, will not obstruct or prejudice the creditor's rights, because he has in such case no ground of preference over other creditors either as a judgment or attaching creditor, or upon the ground of the insolvency of the

[1] Coe *v.* N. J. Midland Ry. Co. 28 N. J. Eq. 27.

[2] Butler *v.* Rahm, 46 Md. 541.

[3] Newby *v.* Oregon Cent. Ry. Co. 1 Sawyer, 63.

corporation. Even if the court had jurisdiction of the property without such lien, it would be authorized to interfere by injunction only in an action by all the creditors, or for the benefit of all the creditors.[1]

404. **A railroad company has no right as against its mortgagee to take up any part of the mortgaged road,** and it may be enjoined from doing so, although that portion of the road which it is taking up is not self-sustaining, but an expense to the company; or although it would be an injury and loss to the company to permit the rails to remain on the street and be destroyed; or although the mortgagee has ample security left for the bonds he claims, and the company is willing to appropriate the proceeds of the sale of the rails taken up in liquidation of the mortgage. The company, by giving the mortgage, has parted with the right to decide the question of the expediency of giving up a part of its road. It has no right to touch the road except in the ordinary use and proper repair of it. The mortgagee has the right to hold all the property mortgaged until he is fully satisfied. His rights cannot be preserved if the mortgagor has the right to destroy the security by inches. Full effect can be given to the contract of the parties only by preserving the whole property intact.[2]

405. **A state cannot be sued except** in cases where it has authorized the bringing of suits against it. But the mere fact that a state officer, whatever may be his grade, is a party, does not necessarily defeat the jurisdiction of the court, although the state may be the real party in interest, and cannot as such be brought before the court. Thus, when the governor and attorney general of a state, under the authority of an act of the legislature, proceed to sell a railroad and its franchises in satisfaction of a statutory lien claimed in behalf of the state, these officers do not act in their political or executive capacity, but simply as agents, in obedience to the power committed to them by the legislative act, which might have conferred the same power upon any other person as well.[3]

[1] Rogers *v.* Mich. South. & N. Ind. R. R. Co. 28 Barb. (N. Y.) 539.

[2] Watt *v.* Hestonville, Mantua & Fairmount Passenger R. R. Co. 1 Brew. (Pa.) 418; *S. C.* 6 Phila. 386.

[3] Murdock *v.* Woodson, 2 Dill. 188. See State *v.* McKay, 43 Mo. 594, 599.

II. *Jurisdiction of State and Federal Courts of Suits against Corporations.*

406. A corporation is not amenable to process, except in the state in which it is established, and in which its corporate functions are exercised. It has no legal existence in any other state.[1] This rule applies not only to state courts, but also to the United States courts. Thus, Mr. Justice McLean, of the Supreme Court of the United States, in a case before him, as judge of the Circuit Court sitting in Indiana, in which an injunction was asked for against the Michigan Central Railroad, a corporation of the State of Michigan, which had constructed a part of its road in the State of Indiana, said:[2] "I know of no process which can reach a corporation of Michigan from the Circuit Court sitting in Indiana. It is amenable to no process out of the state. The Circuit Court of the United States, sitting in a state, has no jurisdiction beyond the limits of the state, except in criminal cases. Subpœnas may be issued for witnesses throughout the United States. In every other particular, the federal court acting in a state is as limited in its jurisdiction as any state court whose jurisdiction extends throughout the state."

The service of process upon the treasurer or other officer of a foreign corporation, although the corporation has an office and place of business within the state, does not give the courts jurisdiction. An attachment of the property of a foreign corporation would, in Massachusetts and some other states, have this effect; jurisdiction may also be given by express statute;[3] and accordingly in several states suits against foreign corporations having agents within the state conducting the general business for which the corporations were organized may be commenced by service of process upon such agents. But generally a corporation which does not exercise its corporate franchises in a foreign state, and which

[1] Bank of Augusta *v.* Earle, 13 Peters, 519, 588; Marshall *v.* Baltimore & Ohio R. R. Co. 16 How. 314, 328; Lafayette Ins. Co. *v.* French, 18 Ib. 404; Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black, 286, 297; Lathrop *v.* Union Pacific Ry. Co. 1 MacArthur (D. C.), 234; Farnum *v.* Blackstone Canal Corp. 1 Sumner, 46; Cleveland & Pittsburg R. R. Co. *v.* Speer, 56 Pa. St. 325.

[2] Northern Indiana R. R. Co. *v.* Michigan Cent. R. R. Co. 5 McLean, 414.

[3] Andrews *v.* Michigan Cent. R. R. Co. 99 Mass. 534.

has no business agency established there, cannot be sued in its courts.[1]

Jurisdiction of a suit against a non-resident corporation cannot be taken upon the ground that the defendant corporation has property within the state, when that property is only the unissued bonds of the company in the hands of its agents for sale. Such bonds are not property within the legal signification of the term.[2]

407. A corporation is foreign to any state only when it owes its corporate existence in no part to the legislation of that state. A corporation is domestic in any state in which corporate powers and franchises have been conferred upon it, or upon an original corporation which has been united in the new one by consolidation. It may have a corporate entity in each of two or more states, and be both foreign and domestic in each. In a suit by or against such consolidated corporation, it must be treated as domestic in each of the states under whose laws it is established as a corporation.[3] But a railroad company incorporated under the laws of one state, and operating its road in another state by the assent of the legislature of the latter, is liable to process in that state as a domestic corporation.[4]

Yet a foreign corporation, upon which the legislature of another state has conferred the power to purchase and hold lands in that state, does not by reason of such legislation acquire a domestic character. It can properly be said to exist only in the state that created it.[5]

An averment that a company is a corporation under and by the laws of a certain state is a sufficient averment that it is a citizen of that state.[6]

408. It is competent, however, to provide by legislation that a foreign corporation having an agency in a state for the

[1] Lathrop *v.* Union Pacific Ry. Co. 1 MacArthur (D. C.), 234.

[2] Barnes *v.* Mobile & North Western R. R. Co. 5 N. Y. Weekly Dig. 191; Coddington *v.* Gilbert, 17 N. Y. 489.

[3] Sprague *v.* Hartford, Providence & Fishkill R. R. Co. 5 R. I. 233; McGregor *v.* Erie Ry. Co. 35 N. J. L. 115; Maryland *v.* Northern Central Ry. Co. 18 Md. 194; Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black, 286; People *v.* Lake Shore & Mich. South. R. R. Co. 11 Hun (N. Y.), 1.

[4] Pennsylvania R. R. Co. *v.* People, Sup. Ct. of Ohio, Dec. T. 1877, 6 Cent. L. J. 436.

[5] State *v.* Delaware, Lackawanna & Western R. R. Co. 30 N. J. L. 473.

[6] Keep *v.* Mich. Lake Shore R. R. Co. 6 Chicago L. News, 101.

transaction of business, or making contracts there, may be held to answer suits in such state commenced by the service of process upon the president, secretary, treasurer, or other agent of the corporation within the state. Thus a railroad company incorporated in Virginia borrowed money in New York through the agency of its treasurer, an and action was commenced, in accordance with a statute, against the company in a court of the latter state, by service of process upon its secretary, who was found in the state, and judgment rendered. Upon a transcript of this judgment suit was brought against the corporation in the District of Columbia, where it had an office; and it was held that the corporation having contracted the debt in New York, its court obtained complete jurisdiction by the service made in the suit, and that the judgment was entitled to the same conclusiveness elsewhere that it had in the state where it was rendered.[1]

409. Citizenship of corporations. — For the purposes of federal jurisdiction a corporation is conclusively considered as if it were a citizen of the state which created it. In the case of a company organized under the laws of one state, and afterwards extending its line of road into another state, under whose laws the company is licensed to act, but is not re-incorporated, the company remains a citizen of the state in which it was originally organized.[2] Without the sanction of the legislature a domestic corporation has no power to sell out to another company all or a part of its road and franchise; and a foreign company without such sanction would have no authority to purchase or operate the road of a domestic corporation. Legislation of a state designed to encourage the building of railroads and to facilitate the making of continuous or connected lines, by authorizing, so far as possible, its own companies to extend their roads into other states, and by conferring upon the companies of other states the right to lease or to buy, and to build and operate roads within its limits, does not ordinarily constitute new corporations of such foreign corporations as may take the benefit of such legislation, but simply

[1] Weymouth *v.* Washington, Georgetown & Alexandria R. R. Co. 1 MacArthur (D. C.), 19.

[2] Muller *v.* Dows, 94 U. S. 444; Railroad Co. *v.* Harris, 12 Wall. 65; Railway Co. *v.* Whitton, 13 Wall. 270, 285; Louisville, Cincinnati & Charleston R. R. Co. *v.* Letson, 2 How. 497; Marshall *v.* Baltimore & Ohio R. R. Co. 16 Ib. 314; New York & Erie R. R. Co. *v.* Shepard, 5 McLean, 455; McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.

gives them, on the conditions stated, certain specified rights, powers, and immunities.[1]

This doctrine of the citizenship of corporations is based upon the presumption which cannot be contradicted, that the individual members of a corporation having a legal existence in a state are citizens of that state.[2] Prior to 1844, it was held necessary to aver that the corporators were citizens of the state; but the Supreme Court of the United States then reëxamined the subject of the jurisdiction of the federal courts, and held that a corporation created by the laws of a state, and having its place of business within that state, must, for the purpose of suit, be regarded as a citizen within the meaning of the Constitution giving jurisdiction founded upon citizenship.[3] It is now the settled construction that an allegation, that a defendant corporation was incorporated by a state other than that of which the plaintiff is a citizen, is a sufficient averment of jurisdiction.

The stockholders of a corporation are conclusively presumed to be citizens of the state which created it, for the purposes of a suit by or against it in a court of the United States. A corporation itself is not a citizen, and therefore the bill should allege the fact of incorporation, and incorporation by a state whereof the adverse party is not a citizen; but a defective averment of citizenship may be cured by subsequent pleadings.[4]

410. **The federal courts have jurisdiction of suits against counties and municipalities** under the same conditions that it has jurisdiction of private corporations. It has been objected as regards counties that they are only *quasi* corporations, and really only subordinate political divisions of a state, and not citizens within the meaning of the Constitution or acts of Congress. In a suit upon bonds in aid of a railway in the Circuit Court of the United States against Washington County, Pennsylvania,[5] Mr.

[1] Williams *v.* Mo., Kansas & Texas Ry. Co. 3 Dill. 267, where Judge Dillon states the law and examines the authorities.

[2] Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black, 286; National Park Bank of N. Y. *v.* Nichols, 4 Biss. 315; Hatch *v.* Chicago, Rock Island & Pacific R. R. Co. 6 Blatchf. 105; Hobbs *v.* Manhattan Ins. Co. 56 Me. 417.

[3] Louisville, Cincinnati & Charleston R. R. Co. *v.* Letson, 2 How. 497.

[4] Muller *v.* Dows, 94 U. S. 444; Lafayette Ins. Co. *v.* French, 18 How. 404.

[5] McCoy *v.* Washington County, 7 Am. Law Reg. 193. See, also, to same effect, Lyell *v.* Supervisors of Lapeer County, 6 McLean, 446; Cowles *v.* Mercer County, 7 Wall. 118; McPike *v.* Lincoln County, C. C. U. S. E. D. of Mo. 7 Cent. L. J. 264.

Justice Grier, in answer to this objection, said: "Though the metaphysical entity called a corporation may not be physically a citizen, yet the law is well settled that it may sue and be sued in the courts of the United States, because it is but the name under which a number of persons, corporators and citizens, may sue and be sued. In deciding the question of jurisdiction, the courts look behind the name to find who are the real parties in interest. In this case the parties to be bound by the judgment are the people of Washington County. That defendant is a municipal corporation, and not a private one, only furnishes a stronger reason why a citizen of another state should have his remedy in this court, and not in a county where the parties against whom the remedy is sought would compose the court and jury to decide their own case."

411. **The federal courts have no jurisdiction of actions between states and their own corporations**; but that jurisdiction extends "to all controversies between a state and the citizens of another state."[1] In a suit by the Commonwealth of Pennsylvania against a corporation, an averment that the defendant is a "body politic in the law of, and doing business in, the State of California," was held to be insufficient to establish the jurisdiction of the courts of the United States, because it did not necessarily import that the corporation was not created by the laws of the State of Pennsylvania.[2]

Inasmuch as the Judiciary Act[3] provides that the United States Circuit Court shall have jurisdiction only of suits between a citizen of the state in which the suit is brought and a citizen of another state, and that suit shall be brought in the district in which the defendant is an inhabitant, or in which he shall be found at the time of serving the writ, if a corporation or person necessary to the litigation, but not belonging to such district, be joined as defendant with other defendants belonging to such district, the court has no jurisdiction of such non-resident party. But in a suit to foreclose a mortgage given by a corporation the bondholders are not necessary parties; and if some of them are joined as de-

[1] By Article xi. of Amendments to the Constitution, a state cannot be sued by citizens of another state.

[2] Pennsylvania *v.* Quicksilver Co. 10 Wall. 553.

[3] Judiciary Act of 1789.

fendants it is not necessary that their citizenship should appear to be such as to entitle them to be parties.[1]

A corporation which has a legal existence in any one state can sue in the federal courts within any other state.[2]

412. Where a railroad company which maintains a continuous line of road through several states holds charters from each of the states in which any part of its road is located, it is, for the purpose of giving jurisdiction to the courts of the United States, a citizen of each of the states under whose laws it exists. Thus, the Philadelphia, Wilmington, and Baltimore Railroad Company, owning a line of road from Philadelphia to Baltimore, running through parts of the States of Pennsylvania, Delaware, and Maryland, and incorporated in each, is a corporation of each of these states, and a citizen of each within the meaning of the Judiciary Act. The fact that only a small portion of its road is in the State of Delaware does not prevent its being sued in that district.[3] With reference to the Ohio and Mississippi Railroad Company, Taney, C. J., said:[4] "It is true that a corporation by the name and style of the plaintiff's appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state except by the law of the state, and neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent under the corporate name the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the state or sovereignty which brings it into life or endues it with its faculties and powers. The Ohio and Mississippi Railroad Company is therefore a distinct and sep-

[1] Keep *v.* Michigan Lake Shore R. R. Co. 6 Chicago Legal News, 101; and see Hervey *v.* Ill. Midland Ry. Co. 7 Biss. 103, as to merely nominal parties having no actual interest.

[2] National Park Bank of N. Y. *v.* Nichols, 4 Biss. 315; Manufacturers' National Bank of Chicago *v.* Baack, 8 Blatchf. 137.

[3] Minot *v.* Phila., Wilmington & Baltimore R. R. Co. 2 Abbott's C. & D. Ct. R. 323; Circuit Court for the District of Delaware, before Strong, J.

[4] Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black, 286.

arate corporate body in Indiana from the corporate body of the same name in Ohio."

413. When two or more states have by concurrent legislation united in creating one and the same railroad corporation, as they may do, a court in either state may exercise jurisdiction over the entire line.[1] By executing a mortgage as one body corporate of the entire line of road and property, the corporation would be estopped in a suit upon such mortgage from setting up its separate existence under the charters it has secured from the different states.[2] Moreover, if in a suit to foreclose such a mortgage the corporation be served with process in the state in which the suit is brought, and it enters its appearance and answers the bill by its common name, the court would have jurisdiction through such appearance of the separate corporations which have joined under such common name if it be conceded that the corporations are separate and distinct;[3] for a corporation may waive its right to be sued only in the state in which it is found or resides, and enter its appearance in any other jurisdiction it pleases.[4]

Where a railroad company owning a railroad lying in two different states, and chartered by each of these states, mortgages the whole road and franchise, whether there are two distinct corporations, or one only, under these charters there is but one mortgage, and that embraces the whole road; and therefore if the right of redemption in one state be sold on execution, the purchaser is entitled to redeem the whole road from the mortgage. He cannot redeem the part lying in one state alone, if he would; for the mortgagees have a lien upon every part of the road to secure every part of the debt.[5]

414. When a mortgage, executed by a railroad corporation organized under the laws of two or more states, covering its entire road and franchises, is foreclosed, by suit in a court having jurisdiction in one state only, but having jurisdiction of the mortgagor and of the mortgage trustees, a valid decree of sale

[1] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 409; *S. C.* Ib. 447, 454; Ellis *v.* Boston, Hartford & Erie R. R. Co. 107 Mass. 1.

[2] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 447, 454.

[3] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 447, 455.

[4] Northern Ind. R. R. Co. *v.* Michigan Cent. R. R. Co. 15 How. 242.

[5] Wood *v.* Goodwin, 49 Me. 260.

of the entire mortgaged property may be made, although a part of the property be situated beyond the court's jurisdiction.[1] While the court cannot send its process beyond its own state, and cannot deliver possession of land in another jurisdiction, it may command and enforce a transfer by process against the defendant. It may, moreover, in a proper case, effect the transfer by the agency of the trustees when they are complainants, by decreeing that they shall sell and convey all the mortgaged property in the several states.[2]

It is true that independent suits may be prosecuted for the foreclosure of a railroad mortgage in each of the several states in which a line of railroad exists; and in such case one suit may be regarded as the principal action and the others merely as auxiliary or subsidiary; or each suit may be prosecuted with the intention of affecting the property within the limits of the state where it is brought. In the latter case the proceedings in the different courts should be uniform, if, as generally would be the case, the interests and the end to be attained are the same, and a sale of the property as a whole is desired.[3]

III. *Effect of Consolidation of Railroad Corporations upon the Jurisdiction of Suits against them.*

415. When two or more corporations organized under the laws of the same state are consolidated, the old corporations are extinguished and their powers merged in the new. The consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts as if no change had been made in the name or organization of the original corporation.[4] When the original corporations were incorporated by the laws of different states, and by concurrent legislation of these states these corporations are consolidated into one company, different views have been entertained not only as to the result of the consolidation upon the original companies, but as to the effect

[1] Muller *v.* Dows, 94 U. S. 444.

[2] McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189; Muller *v.* Dows, *supra.*

[3] *In re* United States Rolling Stock Co. 55 How. Pr. (N. Y.) 286.

[4] Meyer *v.* Johnston, 53 Ala. 237; 15 Am. Railw. R. 467; Indianapolis, Cincinnati & Lafayette R. R. Co. *v.* Jones, 29 Ind. 465; McMahan *v.* Morrison, 16 Ind. 172. See Platt *v.* N. Y. & Boston R. R. Co. 26 Conn. 544; Zimmer *v.* State, 30 Ark. 677; Lauman *v.* Lebanon Valley R. R. Co. 30 Pa. St. 42.

of it upon the new. Upon the one hand it is claimed that the consolidated company is one corporation, while upon the other it is claimed that this is in fact two corporations having the same name, the same officers and stockholders, and a unity of interest. Under the one view, the old corporations no longer exist; while under the other view, they still exist as separate entities, but having the same name. As a practical matter it is generally of no consequence which view is taken. A suit by or against the consolidated company is well brought, whether it be one corporation or two, for the necessary party is in either case before the court.[1]

Two or more states through which a railroad runs may, by concurrent legislation, unite in creating the same body corporate.[2] The Supreme Court of the United States has declared that there is no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several preëxisting corporations into a single one.[3] The effect of the consolidation of several corporations may be to dissolve the old corporations, and at the same instant to create a new one with the property and stockholders of those passing out of existence.[4] But the dissolution of the old corporations does not necessarily follow from their consolidation. Whether such is the result of their union is a question to be determined by the intent of the legislature authorizing the consolidation, and that of the parties uniting in it, as well as by considerations of necessity arising from the rights and liabilities of the old corporations which may be still outstanding after the union.

416. Whether a consolidation of railroad companies works a dissolution of the old companies and the creation of a new company has sometimes been regarded as depending almost wholly upon the legislative intent manifested in the statute under which the consolidation takes place.[5] If the amalgamation be full and complete, the effect may be to work a dissolution of the old company and the creation of a new company. If the statute contains no grant of corporate powers to the consolidated company, it is

[1] Paine *v.* Lake Erie & Louisville R. R. Co. 31 Ind. 283.

[2] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 409; *S. C.* Ib. 447, 454.

[3] Railroad Co. *v.* Harris, 12 Wall. 65, 82; and see Philadelphia & Wilmington R. R. Co. *v.* Maryland, 10 How. 376; Delaware Railroad Tax *in re*, 18 Wall. 206.

[4] Shields *v.* Ohio, 95 U. S. 319.

[5] Central R. R. & Banking Co. *v.* Georgia, 92 U. S. 665.

difficult to see how a new corporation is created. A grant of corporate existence is never implied.[1] The fact that a consolidated company is liable for the debts of the old companies, or that it possesses the rights of the old companies, does not necessarily imply a surrender of the old charters.

417. The consolidation of the stock of railroad companies created by the laws of different states, although done with legislative authority, does not constitute the corporations thus consolidating one corporation of both states, or of either, but the corporation of each state continues a corporation of the state of its creation, the same persons as officers and directors managing and controlling the several corporations as one body.[2] The contract of consolidation, and the legislation authorizing and confirming it, create substantially a new corporation with a new name, but such corporation, in a legal point of view, is a distinct corporation in each state, and so remains. A mortgage made after such consolidation, upon the line of road in one state only, is the sole mortgage of the corporation existing in that state, and is legal and valid. Thus corporations existing in Wisconsin and Illinois were consolidated in this way under the name of the Racine and Mississippi Railroad Company. Under this name it executed a mortgage of that part of the road situate in the State of Illinois. There being a corporation having a distinct entity in each of these states bearing this name, the mortgage was regarded as the mortgage of the Illinois corporation. Another railroad corporation of the latter state having been united with the consolidated company, and a mortgage having been made of the entire railroad line in Illinois owned by the Illinois corporation, although the last consolidation may have been illegal, that fact was held not to affect the validity of the mortgage as to that part of the property not owned by the third corporation at the time of the consolidation. The company having issued its bonds and mortgage under such circumstances was estopped from denying its own corporate existence and its own title to the mortgaged property.[3]

[1] Per Strong, J., in Central R. R. & Banking Co. *v.* Georgia, *supra*; declaring that assertions to the contrary in McMahan *v.* Morrison, 16 Ind. 172; Clearwater *v.* Meredith, 1 Wall. 25, 40, were not necessary to the decisions made.

[2] Racine & Miss. R. R. Co. *v.* Farmers' Loan & Trust Co. 49 Ill. 331.

[3] Racine & Miss. R. R. Co. *v.* Farmers' Loan & Trust Co. *supra*.

When railroad companies organized under the laws of different states have each mortgaged their property, and they have, by virtue of the laws of the respective states, consolidated into one company, a holder of the bonds of one of the old companies may enforce payment in the courts of the state in which the mortgaged road is situate, by a foreclosure suit against the consolidated company; and the courts of the other state in which no part of the road was situated, and to which it in no way owed its existence, have no jurisdiction to enforce the remedy.[1]

418. **A consolidated company is the successor of each of the old companies** so far as concerns a right of action of a creditor of one of the old companies; and the property of the old company in the hands of the new is liable for the satisfaction of any judgment he may obtain.[2] But in respect to the property of other companies, which have joined in the consolidation, the consolidated company is a new and independent company as to the creditors of one of the old companies, and such creditors have no claim against the new property unless the new company has expressly assumed the obligations of the old. An action having been commenced against the Michigan Southern and Northern Indiana Railroad Company and its officers in New York, where it was a foreign corporation, it afterwards consolidated with the Lake Shore Railway Company and with the Buffalo and Erie Railroad Company, pursuant to the laws of the several states by which the original companies were incorporated, and the consolidated companies were known by the name of the Lake Shore and Michigan Southern Railway Company. Upon a reference a judgment for the amount claimed was reported with an order restraining the defendant corporation from making any dividends until the amount was paid. After the coming in of the report, an order was made substituting the Lake Shore and Michigan Southern Railway Company and its officers as defendants. Upon appeal this latter order was held erroneous, as it made the consolidated company and its officers liable upon the original con-

[1] Eaton & Hamilton R. R. Co. *v.* Hunt, 20 Ind. 457.

[2] Pronty *v.* Lake Shore & Mich. South. Ry. Co. 52 N. Y. 363; Chase *v.* Vanderbilt, 62 N. Y. 307; Tagart *v.* Northern Central Ry. Co. 29 Md. 557; Bruffett *v.* Great Western R. R. Co. 25 Ill. 353; Powell *v.* North Mo. R. R. 42 Mo. 63; Selma, Rome & Dalton R. R. Co. *v.* Harbin, 40 Ga. 706.

tracts, and subjected them and all the property of the consolidated company to the restraint adjudged against the old company. The effect of the substitution is not merely to continue against the new corporation and its officers proceedings which affected the property of the original defendants, but to subject the property of two other companies to judgment rendered subsequently to the consolidation in an action to which they were not parties.[1]

After the consolidation of two or more companies into one under a new name, a suit may be maintained against it by that name upon a note or bond executed by one of the consolidated companies. The company is estopped from denying the name by which it is sued. The old company which executed the obligation has, by force of the consolidation, assumed the new name.[2]

419. Where the articles of consolidation of two railway companies provide that the new company shall assume the debts and liabilities of the old companies, and shall carry out all their unexecuted contracts, and the act of legislature, ratifying and confirming the consolidation, saves the rights and remedies of creditors, a creditor of one of the old companies may maintain his action against the new company.[3] The consolidated company, though having a new name, is estopped to deny the name by which it is sued.[4]

When a consolidated company becomes, by virtue of the consolidation, liable for the debts of the companies composing it, the creditors' remedy is complete and adequate at law, and a court of equity will not assume jurisdiction to enforce it.[5]

When a new corporation formed by the consolidation of two or more other corporations assumes the debts and obligations of the original companies, a cause of action by a holder of preferred or guaranteed stock of one of the old companies to enforce an alleged contract to pay specified dividends upon such stock is against the new corporation, and its officers are not necessary or proper parties to the action.[6] "A judgment or decree against the corporation is

[1] Prouty *v.* Lake Shore & Mich. South. Ry. Co. 52 N. Y. 363.

[2] Columbus, Chicago & Ind. Cent. Ry. Co. *v.* Skidmore, 64 Ill. 566; Columbus, Chicago & Ind. Cent. Ry. Co. *v.* Powell, 40 Ind. 87.

[3] Western Union R. R. Co. *v.* Smith, 75 Ill. 496.

[4] Columbus, Chicago & Indiana Cent. Ry. Co. *v.* Skidmore, 69 Ill. 566.

[5] Arbuckle *v.* Ill. Midland Ry. Co. 81 Ill. 429.

[6] Chase *v.* Vanderbilt, 62 N. Y. 307.

binding upon the directors as well as upon all classes of stockholders. It affects the common property of all; and if at any time or for any reason, during the progress of a litigation, it is made to appear that the directors do not or cannot properly protect the special interests of any class, courts, upon application, would have the power to give the necessary relief or an opportunity to be heard. As the directors are under the same obligation to all the stockholders they represent, they cannot be charged by a plaintiff in an action with the duty of especially taking care of and protecting the interests of one class of stockholders as against the others; and if for any sufficient reason the common stockholders, in person or as representatives, are necessary or proper parties, the plaintiff should select other stockholders not having an official relation to the company, not those whose general duty might conflict with special interests, and thus render them improper representatives of a particular class of stockholders."

420. A consolidated company is not the same as one of its constituents as regards an executory contract with a stranger to the undertaking to deliver bonds. The New Jersey, Hudson, and Delaware Railroad Company, having agreed to deliver to subscribers bonds of the company in consideration of moneys to be paid in instalments, as the work upon the railroad should go forward, became amalgamated with two other companies under the name of the New Jersey Midland Railway Company, and having tendered the bonds of the consolidated company, brought suit upon the subscriptions. It was claimed that the company had not ceased to exist, but had merely changed its name and form of organization. It was held that the suit would not lie, the bonds offered not being those agreed for; just as the bonds of a road of ten miles in length are different securities from bonds of a company having a road a hundred miles long.[1]

III. *In Cases of Concurrent Jurisdiction, the Court which first assumes Jurisdiction retains it.*

421. Where two or more courts have concurrent jurisdiction of the same subject matter of litigation, that in which suit is first brought should be left to adjudicate between the parties. Any court in which suit upon the same matter is afterwards

[1] New Jersey Midland Ry. Co. *v.* Strait, 35 N. J. L. 322.

brought should, upon being advised of the pendency of the suit in a court of competent jurisdiction, and having precedence in point of time, dismiss the bill and discharge its receiver, if one has been appointed.[1]

Jurisdiction of a cause and of the subject matter of it once obtained by one court cannot be taken away by proceedings in another court of coördinate jurisdiction. After a bill had been filed in the Circuit Court of the United States for the foreclosure of a mortgage, a compromise agreement was made, providing among other things for the conversion of a portion of the bonds into stock, and a new organization of the company, which the court ratified in the form of a decree. On the faith of the decree, bonds had been surrendered and stock taken, the property placed in the hands of a trustee, who was authorized to incur debts and pledge property to secure them. The decree, so far as it provided for the conversion of bonds into stock, could not, of course, be made effectual without the consent of the bondholders, for that would be changing the contract without their consent. Any bondholder who had not become a party to the agreement could proceed to enforce a foreclosure of the mortgage, and this court, rather than a state court, was the proper tribunal for that purpose. "It was not possible," said Judge Drummond,[2] "that the cause could be divided into fragments, and, in the actual state of affairs, one party in interest go to one court, and another to a different court, for the enforcement of his equitable rights. If the understanding of the parties and the terms of the decree were entirely carried out, there would be no difficulty; but if in that way their expectations were not realized, and there should be a failure to satisfy the claims of the creditors, there would seem to be no question that this court was the proper tribunal to do equity, because it was only by control over the orders of the court, already made, that this could be accomplished." The trustee should also report to that court, and any of the parties in interest had the right to insist upon his so reporting. He had no right to turn over to another tribunal matters which have been partially adjudicated in the Circuit Court, for that was the only

[1] Keep *v.* Michigan Lake Shore R. R. Co. 6 Chicago Legal News, 101; Milwaukee & St. Paul R. R. Co. *v.* Milwaukee & Minn. R. R. Co. 20 Wis. 165.

[2] Bill *v.* New Albany, &c. Ry. Co. 2 Biss. 390.

court whose decision upon the matters involved would be binding upon the parties. Therefore, when the trustee, during the pendency of this suit, without the permission of that court, filed a bill in a state court to foreclose the same mortgages which were the subject of the bill in the Circuit Court, and a receiver was appointed and a sale made in the state court, and the property delivered to the purchaser, such an interference on the part of the state court with property at the time within the jurisdiction of the Circuit Court, was unauthorized, and the latter court has nevertheless jurisdiction of the property, and a bondholder is entitled to the equitable interposition of the court to protect his rights, and to demand an account from the trustee or his representatives. As to the effect of the proceeding in the state court upon the jurisdiction of the Circuit Court over the cause and the subject matter of it, Judge Drummond said: "There can be no doubt it has created great confusion in the position of those claiming under the mortgages, and embarrassment in the court to deal properly with their interests. It has thus brought about an apparent conflict between courts, state and federal, which should always be avoided. But the conflict arises from acts done after the court had obtained jurisdiction of the cause, and for which, therefore, it cannot be justly held accountable; and when a party affected by an order or decree entered in a pending cause asks for relief, it is no answer to say that another jurisdiction has attempted to seize the property, and thus place it beyond the power of the court to give relief. The question always must be, Is it competent for the court to act? If so, its duty is plain, and it necessarily follows from what has been said that, in my opinion, the property is still within the control of this court to adjudicate upon the equitable rights of all who have ever been before it."

422. **Proceedings in a second foreclosure suit while one is pending, void.** — After a foreclosure suit has been commenced, so long as it is pending and the court retains jurisdiction of the cause, other proceedings for the same purpose in another court are irregular and void, although prosecuted under the supposition that the proceedings in the former case were ended. Thus, a suit having been commenced in the Circuit Court of the United States for the District of Indiana in 1857, to foreclose mortgages given by the New Albany and Salem Railroad Company, and a decree

having been entered by consent declaring the rights and interests of the bondholders under the several mortgages and of the stockholders, the purpose of which was to effect a reorganization of the company, no further proceedings were had, when nearly ten years afterwards, in August, 1868, some of the bondholders demanded that the trustee should take proceedings to foreclose the mortgages. The trustee, acting upon the assumption that the original suit brought in the Circuit Court for that purpose had been ended by the decree referred to, commenced suit for the foreclosure desired in a court of the State of Indiana. This suit proceeded to a final decree, under which the property was sold to purchasers who organized themselves into a new company. The holder of a subsequent mortgage bond then petitioned the Circuit Court, in which the original suit was commenced, for the appointment of a receiver in that suit, upon the assumption that this court still retained jurisdiction of the suit and the mortgaged property. This view was sustained by the Circuit Court; and the successor of the trustee who had brought suit in the state court was led to apply for leave to file a supplemental bill for the foreclosure of the mortgages, and his application was granted.[1]

One of the questions which arose upon this supplemental bill was whether a process of subpœna should have issued upon it. The Supreme Court of the United States held that this is only necessary where new parties are brought in. The supplemental bill is a mere adjunct to the original bill, and, where the parties have already been served, no further subpœna for them is required.[2]

V. *Sale of Franchise or Property of Railroad Company on Execution.*

423. The franchise of a railroad company or of any similar corporate body, and corporate property essential to the enjoyment of the franchise, are not subject to sale on execution, unless the legislature assents to the transfer.[3] This is the com-

[1] Bill *v.* New Albany, &c. Ry. Co. 2 Biss. 390.

[2] Shaw *v.* Bill, 95 U. S. 10.

[3] Gue *v.* Tide Water Canal Co. 24 How. 257; Tippetts *v.* Walker, 4 Mass. 595, 597, per Parsons, C. J.; Ludlow *v.* Hurd, 1 Dis. (Ohio) 552; Ammant *v.* New Alexandria & Pittsburg Turnpike Co. 13 S. & R. (Pa.) 210; Leedom *v.* Plymouth R. R. Co. 5 W. & S. (Pa.) 265; Stewart *v.* Jones, 40 Mo. 140; Wood *v.* Truckee Turnpike Co. 24 Cal. 474; Thomas *v.* Armstrong, 7 Cal. 286; Munroe *v.* Thomas, 5 Cal. 470; Hatcher *v.* Toledo, Wabash & Western R. R. Co. 62 Ill. 477; Oakland Ry. Co. *v.* Keenan, 56

mon law rule, and a statute authorizing a sale of a franchise on execution, being in derogation of the common law, will be strictly construed. Thus if the statute provides for a sale of the franchise for the shortest period that will satisfy the execution, a sale of the franchise for a certain period in part payment of the execution is void.[1] As already noticed,[2] privileges granted to corporations of a public character are conferred with a view to the public use and accommodation, and they cannot voluntarily deprive themselves of their franchises or of their property necessary for the exercise of these franchises; and in pursuance of the same policy the franchises and property of such corporations are not allowed to be taken from them on execution, because this would tend to defeat the whole object of the charter, and either to place the property and franchises in the hands of parties to whom it had not been confided, or else to break up and destroy the corporation and render its improvements useless to the public.[3]

A turnpike road cannot be levied upon by a judgment creditor. Aside from the remedy that might be afforded by a Court of Chancery, there is no remedy for the collection of debts against such property, unless it be given by statute, in the nature of a sequestration, to take the net profits after providing for the repair and maintenance of the road. Real estate of the company not necessary for the use of the road may be taken on execution; but if such real estate be blended with the road in one levy so that it is difficult to separate them, the court will set aside the whole proceedings.[4]

424. The mere fact that the property of a railroad is subject to a mortgage does not operate to exempt such property, which is in its nature personal, from being levied upon by judgment creditors of the company so long as the mortgagee has not taken possession under the mortgage. The only remedy of the mortgagee in such case is to invoke the interposition of a Court of Equity to prevent further proceedings upon the execution; and

Pa. St. 198. *Contra*, State *v.* Rives, 5 Ired (N. C.) L. 297.

[1] James *v.* Pontiac & Groveland Plank Road Co. 8 Mich. 91; and see Seymour *v.* Milford & Chillicothe Turnpike Co. 10 Ohio, 476.

[2] §§ 1–25.

[3] Susquehanna Canal Co. *v.* Bonham, 9 W. & S. (Pa.) 72.

[4] Ammant *v.* New Alexandria & Pittsburg Turnpike Road Co. 13 S. & R. (Pa.) 210; and confirmed by Susquehanna Canal Co. *v.* Bonham, *supra*.

an injunction will be granted upon its appearing that the mortgage security is inadequate.[1] It is not sufficient, however, to show that the constant and uninterrupted use and enjoyment of the property by the railroad company is indispensable to enable it to earn money with which to pay the interest, as it becomes due. It must be averred and proved that the security would be affected to entitle the mortgagee to this relief.[2]

A corporation upon whose property an execution has been levied cannot itself claim protection against the execution and obtain an injunction against a sale under the execution, upon the ground that the property is covered by mortgage; whatever protection the mortgagee is entitled to must be asserted by himself.[3]

425. Any property, which is a part of a railroad mortgaged as an entire property, is exempt from execution. — Rails and chairs, lying by the track in readiness for repairs or reconstruction, are not liable to levy and sale on execution as against a mortgagee of the road;[4] nor, according to some authorities, are they so liable as personal property even as against the railway company itself. The general principle governing this matter is stated in Sheppard's Touchstone:[5] "That which is parcel or of the essence of a thing, albeit at the time of the grant it be actually severed from it, doth pass by the grant of the thing itself. And, therefore, by the grant of a mill the millstone doth pass, albeit at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys, do pass as parcel of it, albeit at the time of the grant they be actually severed from the house."

A mortgage of the entire property of a railroad company, both that which it has at the time and that which it may afterwards acquire, together with its tools and income, covers wood bought for its use; and therefore a judgment creditor may be enjoined from selling and removing such property on petition of the mortgagees, when it appears that the whole property mortgaged is

[1] Coe *v.* Peacock, 14 Ohio St. 187; Lane *v.* Baughman, 17 Ib. 642; Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372, 380.

[2] Coe *v.* Knox County Bank of Mount Vernon, 10 Ohio St. 412.

[3] Boyd *v.* Chesapeake & Ohio Canal Co. 17 Md. 195.

[4] Covey *v.* Pittsburg, Fort Wayne & Chicago R. R. Co. 3 Phila. (Pa.) 173; Fahs *v.* Roberts, 54 Ill. 194. See §§ 154–163.

[5] Shep. Touch. page 90.

inadequate to satisfy the mortgage debt.[1] The remedy of a judgment creditor in such case is in equity, to have the interest of the mortgagor ascertained and subjected, in such mode as may be consistent with the rights of the prior incumbrancers, to the payment of his judgment. Under a mortgage which contains an express reservation of "so much of the income as might be necessary to pay for the running expenses and repairs" of the road, when the nature of a claim against the road is such as to entitle the creditor to have it paid out of the earnings of the company, this may be accomplished by appropriate proceedings in equity. A claim for damages, on account of stock killed upon the road, would doubtless come within such an exception, and, perhaps, even without such express reservation, it ought to be regarded as an incidental liability incurred by the company in operating the road, and to be deducted from the earnings before the net income covered by the mortgage could be ascertained.[2]

426. **But in Minnesota personal property may be seized upon execution,** even as against a mortgagee. Lumber or cord-wood belonging to a railroad company whose property is subject to mortgage is subject to levy and sale upon execution by a judgment creditor of the company. Such sale divests the company of its property in the lumber or wood, and passes it to the purchaser. It severs whatever relation or connection of appurtenance or otherwise that existed between the lumber or cord-wood, and the railroad, and the running or operating of the same. A receiver, subsequently appointed in a suit for foreclosure, cannot recover possession of such property. Power conferred upon such receiver to take possession of the railroad and its property, "and also all other goods and chattels owned by said company in any way relating or appertaining to or connected with said railroad, or the running or operating of the same," does not avail the receiver, because such property was not owned by the company, the prior sale having divested it of all title to this property.[3]

427. **In a sale of property to a railroad company a stipulation as to the time of the passing of title is binding between**

[1] Lane *v.* Baughman, 17 Ohio St. 642; Coe *v.* Peacock, 14 Ib. 187. See, however, Fahs *v.* Roberts, 54 Ill. 194.

[2] Lane *v.* Baughman, 17 Ohio St. 642, 648, per White, J.

[3] McIlrath *v.* Snure, 22 Minn. 391.

the parties to the contract, and also as against creditors of the company who have notice of such contract. Thus the St. Joseph and Denver City Railroad Company having purchased ties under an agreement that they should not be considered the property of the company until placed under the rail, a creditor of the company, knowing the terms of the contract, could acquire no title to such ties by a levy and sale on execution after the company had taken possession of the ties and moved them to different places along the line of the road. Such a sale is conditional, and until the condition is performed no title passes.[1]

428. The appropriate remedy of a judgment creditor against a railroad corporation is by application to a Court of Equity, seeking a discovery as to the condition of the company; and upon the failure of the officers to pay when directed the chancellor may take possession of the road through a receiver, and apply the net income or any surplus fund to the payment of the creditor's claim. "To permit every and any agent of a corporation like this to be garnisheed before or after judgment would result in the sacrifice of all the private and public interests connected with it. The chancellor, by giving to the creditor the income of the road, retaining enough to defray the necessary expenses of the corporation, has given him all that he has the right to demand, and at the same time preserves the corporate property for private and public use. Nor does this ruling prevent a corporation from being garnisheed as the debtor of a third party, whose creditor is seeking to make his debt. In such a case, however, the court will require payment to be made in the same manner as if the company were the real debtor." [2]

This is the practice adopted in England.[3] The Supreme Court of the United States in like manner, where there was a judgment at law against a bridge company, under which the tolls were sold in execution, approved of the appointment in equity of a receiver to collect tolls, and pay them into court, to the end of discharging the judgments at law. The court declared that the remedy at law of creditors holding executions against corporations is ex-

[1] Owens *v.* Hastings, 18 Kans. 446.

[2] Wilder *v.* Shea, 13 Bush (Ky.), 128, per Pryor, J.

[3] Blanchard *v.* Cawthorne, 4 Sim. 566; Fripp *v.* Chard Ry. Co. 11 Hare. 241.

ceedingly embarrassed, and that they could not obtain satisfaction of their judgments unless equity afforded relief.[1]

Where a judgment is by law a lien upon the debtor's real estate, and a railroad company is by statute the owner in fee of the real estate taken for its right of way, as is the case in Wisconsin, a suit in equity may be brought to have a judgment against a railroad company declared a lien; and upon a sale under a decree, followed by a conveyance duly confirmed by the court, the whole interest of the company existing at the time of the rendition of the judgment passes to the purchaser.[2]

In Massachusetts it is provided that the franchise of a turnpike or other corporation authorized to receive toll, and all the rights and privileges thereof, are liable to attachment on mesne process and to sale on execution. In the sale of such franchise, the person who satisfies the execution with all fees and expenses, or who agrees to take such franchise for the shortest period of time, and to receive during such time all such toll as the corporation would by law be entitled to demand, is considered the highest bidder. The corporation retains its powers in all other respects than that to take the tolls, and is bound to the discharge of its duties just as it was before the sale.[3]

429. Statutory provisions for enforcing executions against railroad companies. — In New York the mode appointed by law for the collection of a judgment against a railroad company after the return of an execution unsatisfied, is by an action in which a receiver is appointed and the property of the company sequestered for the creditor's benefit.[4]

In Pennsylvania it is provided by statute that a judgment creditor of a corporation may have execution by *fieri facias*, which shall command the sheriff to levy upon any personal or real property, franchises, and rights of such corporation, and sell the same. The levy may extend to the property, franchises, and rights of the corporation in every county of the commonwealth, and the sale thereof is as effectual as though all the property and rights

[1] Covington Drawbridge Co. *v.* Shepherd, 21 How. 112, 124; and see Macon & Western R. R. Co. *v.* Parker, 9 Ga. 377.

[2] Railroad Co. *v.* James, 6 Wall. 750.

[3] Gen. Stat. 1860, ch. 68, §§ 25–34. There is a somewhat similar statute in Delaware. R. Code 1874, pp. 377, 378.

[4] 3 R. S. (5th ed.) 763, § 44; 1 Laws 1870, ch. 422, § 3; Loder *v.* N. Y., Utica & Ogdensburgh R. R. Co. 4 Hun (N.Y.), 22.

were located and levied upon and sold in the county wherein the execution was issued.[1] Insolvent corporations are proceeded against by sequestration.[2]

In a late case the sale by a sheriff upon a judgment of part of a road lying in one state seems to have been regarded as an unjustifiable abuse of a legal right which would be restrained on a bill filed by any bondholder.[3]

In Virginia the road and franchises of a railroad company are liable for the payment of judgments recovered against it. Instead of selling the interest of the corporation to satisfy a small debt, the court may direct a lease of it to be made for the shortest period, for which a sufficient rent may be obtained to pay the debts and the costs of suit. If to accomplish this object it is necessary to lease the railroad for a term which will yield in rents a sum far exceeding the amount of the judgments, and it cannot be leased for a shorter term, the creditors are entitled to have it leased for the longer term.[4]

Likewise in Kentucky a railroad and its appurtenances are treated in law as one entire thing, which cannot be sold to enforce the payment of taxes in parcels, as for instance all of the road in one county cannot be sold for the payment of the tax within that county. Fragmentary taxations or sales might be unjustly vexatious and injurious to the owners, and might disturb the public use and interest.[5]

In Georgia a chartered railroad, with all its rights and privileges, including its corporate franchise, is property subject to be applied to the payment of its debts, and may be sold under a judgment at law. The franchise of the company is property. It is in fact the chief value of a railroad. There is no exemption of any property of a corporation from the payment of its debts. The judgment and execution must be framed upon equitable principles, although under the peculiar system in this state, a court of law may generally administer as ample relief as a court of equity.[6]

[1] Act of 1870, p. 58, § 1; 1 Brightly's Purdon's Dig. 291.

[2] Oakland Ry. Co *v.* Keenan, 56 Pa. St. 198.

[3] Dupont *v.* Bushong, U. S. Circuit Ct. 1 Weekly Notes of Cases, 378.

[4] Winchester & Strasburg R. R. Co. *v.* Colfelt, 27 Gratt. (Va.) 777.

[5] Applegate *v.* Ernst, 3 Bush (Ky.), 648.

[6] City of Atlanta *v.* Grant, 57 Ga. 340. In regard to the franchise of the corporation the court said that without it the railroad would be almost worthless. "To own it would be like owning a horse, with no right to ride him or drive him, — no

In Mississippi the equity of redemption of a railroad company is subject to sale for the payment of the company's debts, however long a time the mortgage may have to run. A resort to chancery is now necessary in all cases.[1]

In Texas,[2] the road-bed, track, franchise, and chartered rights and privileges of any railroad company are made subject to the payment of its debts and legal liabilities, and may be sold in legal satisfaction of the same; but whenever judgment is rendered against any railroad company, the party in whose favor such judgment is rendered may have execution thereon, directed to the sheriff of that county in which the principal office of said company is kept; and if the said company fail to point out other property to satisfy said execution, the sheriff may, at the request of the plaintiff, levy the same upon the road-bed, track, franchise, and chartered powers and privileges of said company; and said levy is held to embrace the whole road-bed, and track, and entire line of said railroad, whether situated in the same county or not; and he is required to proceed to advertise and sell the same at the court-house door of his county, as in other cases, making the same advertisement as is provided by law in cases of the sale of lands; and upon said sale, to execute to the purchaser a conveyance of the said road-bed, track, franchise, chartered powers, rights and privileges.

In California,[3] for the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise, and all the rights and privileges thereof, may be levied upon and sold under execution, in the same manner and with like effect as any other property. The purchaser at the sale receives a certificate of purchase of the franchise, and is immediately let into the possession of all property necessary for the exercise of the powers, and the receipt of the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same, which may be made at any time within one year after such sale.

right to put him to labor. This would be owning materials, merely; the iron and timbers, the earth and masonry, of the railroad; or the hide and flesh and bones of the horse."

[1] Vicksburg & Meridian R. R. Co. *v.* McCutchen, 52 Miss. 645.

[2] Paschal's Dig. 1866, p. 820, arts. 4912, 4914.

[3] Code and Stat. 1876, §§ 5388, 5389, 5392, 5393. The same statute is re-enacted in Dakota T. Civil Code 1877, §§ 442 447.

430. Funds in possession of the president, officers, and agents of a railroad company are not subject to garnishment in an ordinary action by a creditor against the company.[1] Their possession is the possession of the company, and to garnishee them in an action against the company is to garnishee the debtor, and not a creditor of the debtor. Such a proceeding is in effect an attempt "to compel the corporation to pull the money out of its pocket."[2] Funds in the possession of the president or other officer of a corporation authorized to receive and hold them for the company are in the possession of the company, — are in its treasury, and not in the possession of the officer as an individual. "The servant who feeds, waters, and curries his master's horse, and keeps the key of the stable, the master having the actual and dominant possession and control; the clerk who opens and shuts the store and sells the goods, subordinate to the actual possession of the merchant; the treasurer of the corporation who has charge of the safe and the moneys therein, and receives and pays out, under the immediate direction and control of the principal officers, are not to be deemed in such possession and control of the properties as subjects them to garnishment."[3]

[1] Wilder *v.* Shea, 13 Bush (Ky.), 128. See §§ 114–120.

[2] Wilder *v.* Shea, *supra*, per Pryor, J.

[3] McGraw *v.* Memphis & Ohio R. R. Co. 5 Cold. (Tenn.), 434, 439. See §§ 114–120.

CHAPTER XIV.

FORECLOSURE PROCEEDINGS UNDER CORPORATE MORTGAGES.

I. Parties plaintiff, 431–437.
II. Parties defendant, 438–448.
III. Defences, 449–451.
IV. Decrees, 452–455.

In the present chapter it is proposed to examine only such decisions as relate directly to the foreclosure of corporate mortgages. For general principles governing proceedings in equitable suits of foreclosure, determining the parties to such suits, the pleadings and the decrees, reference should be had, if there be occasion, to general treatises.[1]

I. *Parties Plaintiff.*

431. A mortgagee, although he does not himself own any part of the mortgage debt, the mortgage being in fact made to him as trustee for the benefit of the holders of certain notes, but not expressing the trust upon its face, is the proper party to enforce it by foreclosure suit.[2] He not only holds the legal title, under which he could maintain an action to recover possession of the property mortgaged upon condition broken, but by his relation to the holders of the notes he is a trustee, presumptively clothed with the requisite power to act for them in the collection of the debt. Whether such holders be numerous or not he may bring suit to enforce the security without uniting those for whose benefit it is prosecuted.

432. A single bondholder, unless restrained by the terms of the mortgage, may maintain a bill in equity to foreclose a mortgage, bringing it in his own name, but for the benefit of all other bondholders as well as of himself. In this respect it makes

[1] See Jones on Mortgages, chs. xxi. xxii. §§ 1367–1515.

[2] Hayes *v.* Galion Gas Light & Coal Co. 29 Ohio St. 330; Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372.

no difference whether the bondholder is secured by a mortgage deed strictly such, where the mortgagee holds the title in trust for the holders of such of the bonds as he has transferred, or whether he is secured by a trust deed in the usual form, where a trustee holds the title for the benefit of all the bondholders.[1]

Ordinarily a bondholder secured by a mortgage to trustees is not allowed to sue the corporation with respect to any matter within the trust, except when it appears that the trustees refuse or neglect to act, or have assumed a position prejudicial to the interests of the bondholders, or there is a vacancy in the office.[2]

433. A single bondholder may insist upon a foreclosure, although the mortgage provides for a foreclosure by the trustee upon request of the majority of the bondholders secured by the mortgage. Inasmuch as a provision in a railroad mortgage authorizing the trustee, on the company's default, to take possession of the property, and upon notice to sell it, is a cumulative remedy which does not affect the right to foreclose by bill in equity, a provision in the deed authorizing the trustee, upon request of a majority of the holders of bonds, to exercise the power, does not in any way affect the right of a single bondholder, upon default of the company, to insist upon a foreclosure in equity, at least for the amount of the interest overdue, if the whole principal debt has not become due by lapse of time, or by virtue of any provision of the mortgage. This point is illustrated by the case of *Alexander* v. *Central Railroad of Iowa*,[3] before the Circuit Court of the United States for the District of Iowa. This company had executed a mortgage containing the following provision: "And it is agreed, in case of the default of the payment of the semi-annual interest, as above provided, that said trustee, or its successors, is hereby expressly authorized and empowered, *upon the request in writing of a majority* of the owners or holders of said bonds, to enter into and upon, and to take actual possession of all the property, real and personal, and rights, franchises, and

[1] Mason *v.* York & Cumberland R. R. Co. 52 Me. 82; March *v.* Eastern R. R. Co. 40 N. H. 548, 566.

[2] Knapp *v.* Railroad Co. 20 Wall. 117; Coal Co. *v.* Blatchford, 11 Wall. 172, 177; Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459, 478; Campbell *v.* Railroad Co. 1 Woods, 368, 376.

[3] 3 Dill. 487; 1 Cent. L. J. 543. See, also, relating to the same case, Farmers' Loan & Trust Co. *v.* Cent. R. R. of Iowa, 4 Dill. 533; 5 Cent. L. J. 56; Sage *v.* Same, 93 U. S. 412.

privileges of the premises hereby conveyed, and each and every part thereof, and by their agents or attorneys have, hold, use, and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions, and improvements thereto, as fully as the parties of the first part might have done before such entry; and to collect and receive all tolls, freight, incomes, rents, issues, and profits of the same, and of every part thereof; and the said trustee and its successors shall and may, and hereby is expressly authorized and empowered to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises, and privileges conveyed." And it was further provided that in case the company should make default in the payment of interest on any bond secured by the mortgage, then, after the expiration of twelve months from the time it became due, and without demand or notice, *at the election or option of a majority of the holders of said bonds, the whole principal sum* mentioned in each and all of the said mortgage bonds then outstanding *shall, forthwith, become due and payable*, and the lien or incumbrance thereby created for the security and payment thereof may at once be enforced.

A default having occurred in the payment of interest, certain bondholders requested the trustee in the mortgage, the Farmers' Loan and Trust Company, to bring a suit to foreclose the mortgage, and upon its refusal so to do they themselves filed a bill in equity for that purpose in their own behalf, and for all other bondholders who might be similarly situated, to which the trustee was made a party defendant. The trustee appeared and filed an answer, setting up that a majority of the bondholders had never demanded action on the part of the trustee, and that it was willing to submit to the direction of the court as to its duty in the premises, and to become plaintiff if the court should so order. The railroad company demurred to the bill, on the ground that under the provisions of the deed of trust there could be no foreclosure by bondholders, or by the trustee, unless a majority of the bondholders so desired, and there was no such averment in the bill. The court, however, held that the bill was properly brought; but if the plaintiffs elected to dismiss the bill as to the trustee, the latter might be allowed to become a party plaintiff, and to file a bill for the benefit of all the bondholders. The provisions of the mortgage deed did not restrict the right of any coupon holder to

foreclose for interest after a default for the requisite time. By the terms of the mortgage the whole principal would not become due upon a default in the payment of interest, except at the election of a majority of the holders of the bonds; and so, therefore, without such action on the part of the bondholders, there could be no foreclosure in equity for anything more than the overdue interest. But to this extent any one of the bondholders could invoke the remedy in equity to foreclose.

Judge Dillon, of the Circuit Court of the United States, after noticing that the power of sale in the deed of trust is a cumulative remedy for the benefit of mortgage creditors, and does not exclude their right to resort to the judicial tribunals for a foreclosure, said: "Provisions in an instrument of this character limiting the right of a mortgage creditor to resort to a Court of Chancery to foreclose his security are not to be extended beyond the fair meaning of the language used; and it is our opinion that there is no restriction in the deed of trust before us upon the right of the coupon holder to foreclose for interest upon default, although a majority of the bondholders do not unite in the suit, or request the trustee to bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the *whole principal sum* become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unabridged right of any coupon holder to foreclose for *interest*, in the manner sought in the present bill, and it was not necessary that a *majority* of the coupon holders should unite in bringing the bill, or in a request to the trustee to bring it. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon holders, making the trustee a defendant. If the plaintiffs elect to dismiss the bill as to the trustee, we will allow the trustee to become a party plaintiff, and to file a bill for all the bondholders; but it would be anomalous to have the trustee on the record both as defendant and plaintiff in the same proceeding. The demurrer of the railroad company to the bill is overruled."

434. **It is not necessary that all the bondholders should actually join in the suit.** — When a foreclosure suit has been

commenced by bondholders in behalf of themselves and all other bondholders whose bonds are secured by the same deed, who choose to come in as complainants and bear their share of the expenses of the suit, and the trustees of the mortgage are made defendants, it is not necessary that all the bondholders shall be made actual parties, especially when they are numerous, and many of them unknown.[1] To require all of them to be made parties, and in the case of the death of any that the suit should be revived in the name of the personal representative of the deceased party, before any final decree could be rendered, would be to deny the bondholders any relief. The rule and practice of courts of equity in such cases is that the case may proceed when the court has sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants. The interests of the bondholders are represented by the actual complainants, and by the trustees who are made parties defendant. The other bondholders may be allowed to come in as complainants, or may propound their claims before the master.

A holder of part of the bonds secured by a mortgage of property insufficient to satisfy the entire mortgage debt, has no right to appropriate to his sole benefit, by execution and sale, the property mortgaged to secure all the bonds. The bondholders have a common interest in the security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, a distribution must be made in equity among all the holders of bonds *pro rata*.[2] To permit a bondholder to proceed at law for the collection of a part of the mortgage debt by execution against the mortgaged property would prevent a *pro rata* distribution in case of a deficiency, and would give him an inequitable preference over his fellow-bondholders.[3]

A single bondholder cannot attach and apply to the payment of his claim any part of the property mortgaged to pay his own bonds and others secured by the mortgage without alleging and proving that the other debts secured by the mortgage have been

[1] Mason *v.* York & Cumberland R. R. Co. 52 Me. 82; March *v.* Eastern R. R. Co. 40 N. H. 548, 566; Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 447; Campbell *v.* Railroad Co. 1 Woods, 368.

[2] Pennock *v.* Coe, 23 How. 117.

[3] Fish *v.* N. Y. Water-Proof Paper Co. 29 N. J. Eq. 16.

paid, and bringing the mortgage trustees or other holders of the legal title before the court.[1]

435. One who holds bonds of a railroad company as collateral security has the same right as any other bondholder to press a sale of the mortgaged property.[2]

To a suit by bondholders to foreclose a mortgage, the mortgagor may plead that the complainants are not the absolute owners of the bonds, but hold them as collateral security for a debt less in amount than the money due on the bonds, and that the assignor should be made a party to the bill.[3]

In a suit against a railroad company by the pledgees of its bonds as collateral security for its own indebtedness to a smaller amount, a decree can be entered for only the amount secured by the pledge.[4]

436. After individual bondholders have filed a bill to foreclose a mortgage in behalf of themselves and all others in like interest, the trustees to whom the mortgage was made may come in and ask to become complainants instead of defendants, and their request will generally be allowed unless it appear that they have adverse interests and are not in good faith fulfilling their trust. So soon as they are admitted as complainants, however, they have control of the suit, and are charged with the conduct of it. The only standing the original complainants, the bondholders, have, must arise from an allegation that the trustees were derelict in their duty; or from some like allegation showing the neglect or refusal of the trustees to act. When the trustees come into court, deny the charge of neglect or unfaithfulness, and ask to do what the bondholders allege they ought to do, but were unwilling or neglected to do, and are allowed to become complainants, they then become masters of the suit.[5]

The trustees in such case may be allowed in the discretion of the court to dismiss the proceedings commenced by the bondholders and proceed in another court. Thus a bill to foreclose a

[1] Martin *v.* Mobile & Ohio R. R. Co. 7 Bush (Ky.), 116.

[2] McCurdy's Appeal, 65 Pa. St. 290.

[3] Ackerson *v.* Lodi Branch R. R. Co. 28 N. J. Eq. 542.

[4] Jesup *v.* City Bank of Racine, 14 Wis. 331.

[5] Richards *v.* Chesapeake & Ohio R. R. Co. 1 Hughes, 28. See, also, Farmers' Loan & Trust Co. *v.* Central R. R. Co. of Iowa, 11 West. Jurist, 428.

mortgage made by the Chesapeake and Ohio Railroad Company, brought by bondholders in the Circuit Court of the United States for the Eastern District of Virginia,[1] was dismissed at the request of the trustees who had subsequently been admitted as complainant, in order that they might be allowed to proceed in the courts of the State of Virginia, in which they had commenced proceedings, and where, as they alleged, certain difficulties in regard to jurisdiction which arose in the Circuit Court would not be in the way of their proceedings; and where they would have other advantages in prosecuting the suit. All the bondholders under the mortgage acquiescing in their request, with the exception of a few holding a comparatively small amount, the Circuit Court declared that, for the court to determine that the trustees shall proceed in that court and not elsewhere, there being no charge of duplicity or fraud on their part, would be to set up the opinion of the court as to what the best interests of these *cestuis que trust* are against those of themselves and of the trustees who are legally charged with the care of those interests. The objection to the original bill in this case being in large part on account of the absence of proper parties, the bondholders who objected to the dismissal of the bill asked leave, if the court should allow the motion to dismiss, to file a new bill, which should include all the proper parties, and should relate back to the time of the filing of the original bill. "A fatal objection to this request," said Judge Bond, "is, that now that the trustees have undertaken by legal means to foreclose this mortgage, no bondholder has a right to proceed in his own name to foreclose. He can ask the aid of a court of equity, only on the ground of unfaithfulness, neglect, or inability on the part of the trustees. Upon due consideration, therefore, the court will make an order directing the receiver to settle his accounts up to a day named therein, and to make a report thereof to the court up to that date, whereupon he will be discharged, and the complainants be allowed to dismiss their proceedings and prosecute those already commenced in the state court." In this opinion Chief Justice Waite concurred.

437. When a railroad company mortgages its property directly to all its bondholders by name, to secure specifically to each the amount due on the bonds to him, no one bondholder,

[1] Richards *v.* Chesapeake & Ohio R. R. Co. 1 Hughes, 28.

even when professing to act in behalf of all bondholders who may come in and contribute to the expenses of the suit, can proceed alone against the company, and ask a sale of the property. It is a general rule both at law and in equity, that a suit upon a written instrument must be brought in the name of all persons who are parties to it or have an interest in it. Then if it appears that the mortgage is an inadequate security, there is another reason why one bondholder or a part of the bondholders cannot proceed without the others. In such case it is the interest of every bondholder to diminish the claim of every other bondholder. "In so far as he succeeds in doing that he adds to his own security. Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be occasion for it. If upon a fair adjustment of the amount of the debts there should be a deficiency in the security, real or apprehended, every one interested should have notice in advance of the time, place, and mode of sale, that he may make timely arrangements to secure a sale of the property at its full value." [1]

II. *Parties Defendant.*

438. The bondholders for whose benefit a mortgage of the property and franchises of a railroad company has been made to trustees are not necessary parties to a bill in equity brought by the trustees against the company to foreclose the mortgage.[2]

A trustee for bondholders represents their interests, and when made a party to a suit affecting their interests, they are as much bound by the decree rendered in the suit as if they were individually made parties to the suit. If a trustee, who is made a party to the suit, is himself a bondholder, he cannot afterwards litigate the same subject matter in his individual capacity. If he owned the bonds at the time, he is bound because he was representing himself. If he has bought them since the suit, he is bound as privy to the person who was represented.[3]

The bondholders are not necessary parties whether the mortgage constitutes a prior or subsequent incumbrance, or whether the trustees be complainants or defendants in the suit. Bondholders are privies in interest, and may come in to defend *pro in-*

[1] Railroad Co. *v.* Orr, 18 Wall. 471.

[2] Shaw *v.* Norfolk County R. R. Co. 5 Gray (Mass.), 162.

[3] Corcoran *v.* Chesapeake & Ohio Canal Co. 94 U. S. 741.

teresse suo, but their rights are affected by a decree against a trustee. He does not stand in the attitude of a stranger claiming collaterally, but comes in under the mortgage.[1]

439. A state which has indorsed the bonds of a railroad company, and has a statutory lien upon the property of the company for their payment, has an interest in a suit instituted by the holders of such bonds praying that they may be subrogated to the lien and rights of the state, and that the lien be established, and should be made a party if possible. But the fact that the state cannot be made a party is a sufficient reason for excusing her absence from the suit.[2] If the suit be in the Circuit Court of the United States within the state interested, and against a corporation organized under the laws of that state, while it is impossible to make the state a defendant, she cannot even by her own consent be made a party complainant, for that would oust the jurisdiction of the court.[3] "Suppose," said Judge Woods, "we turn the complainants out of this court because the state is not a party. If they go into the state court, they are met by the same difficulty, for the state will not allow herself to be sued in her own courts. Can it be possible that these complainants are without remedy against the railroad company because their bonds are indorsed by the plighted faith of the State of Alabama? It would be a reproach to the administration of justice to so hold." The complainants do not ask any relief against the state, but only a decree against the railroad company, for the unpaid interest upon the bonds and for a sale of the property pledged as security. Although the state is interested in having the property fairly applied to the extinguishment of the security, there is no reason why she must necessarily be made a party to a suit in which no decree is sought against her. "The indorser of a note secured by a mortgage is not a necessary party to a suit to foreclose the mortgage. If the state has paid any interest on these bonds, and is thereby entitled to any part of the proceeds of the mortgaged property, she can propound her claim before the mas-

[1] Board of Supervisors of Iowa County *v.* Mineral Point R. R. Co. 24 Wis. 93; McElrath *v.* Pittsburg & Steubenville R. R. Co. 68 Pa. St. 37; Campbell *v.* Railroad Co. 1 Woods, 368.

[2] Davis *v.* Gray, 16 Wall. 203, 220.

[3] Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606.

ter, and it will be allowed." Neither is the fact that the state cannot be sued any reason why the holders of the bonds should not be subrogated to the rights of the state and have the benefit of the security. Subrogation is an equitable principle and is resorted to in order to prevent a failure of justice.

440. **Whether the United States can compulsorily be made a defendant** in a suit to foreclose a mortgage on a railway upon which it holds a lien or mortgage is an unsettled question;[1] though Mr. Justice Grier, in the Circuit Court of the United States, has held that a mortgagee may have an effectual decree of foreclosure where the United States is the owner of the equity of redemption, on a notice given in such manner as the court may prescribe, if the land be not held for government purposes.[2]

441. **A subsequent mortgagee** not made a party to a bill to foreclose a prior mortgage is unaffected by a sale under a decree rendered in such suit, and consequently he cannot have an injunction to restrain such sale. He may redeem at any time by tendering the amount due; and if only the interest on the prior mortgage is due he may redeem on tendering that. The Jacksonville, Pensacola, and Mobile Railroad Company issued bonds under the Internal Improvement Act of the State of Florida, which the trustees of the fund guaranteed upon the condition provided by the act, that the bonds should be a first lien on the road, and on the failure of the company to provide and pay the interest, and one per cent. per annum for sinking fund, it should be the duty of the trustees, after thirty days from default, to take possession of the road and property, and advertise and sell it to the highest bidder, and apply the proceeds to purchasing and cancelling outstanding bonds of the company, or incorporate them with the sinking fund. Default was made, and the trustees sold the railroad for a sum sufficient to retire the guaranteed bonds of the company; but the purchasers, after paying a portion of the purchase money with which a portion of these bonds were retired, managed to get a deed of the property and evaded or failed to pay the balance. The holders of some of the outstanding bonds then brought a bill against the holders of the property on the

[1] Meier *v.* Kansas Pacific Ry. 4 Dill. 378.

[2] Elliot *v.* Van Voorst, 3 Wall. Jun. 299.

equity of the vendor's lien, to compel the payment of the balance of the purchase money, and obtained a decree and execution. A holder of second mortgage bonds of the company, who was not made a party to either the suit to foreclose the lien of the guaranteed bonds, or to the suit by the holders of such bonds to obtain payment of the balance of the purchase money, filed a bill to enjoin the sale. He claimed among other things that the principal of the first mortgage bonds was not due at the time of the sale by the trustees of the improvement fund, and that the second mortgagees ought to have the privilege of redeeming; but as he was not injured by the sale already had, and could not be injured by the proposed sale, his prayer was denied.[1]

442. **Subsequent judgment creditors.** — A mortgage or judgment prior in point of time is paramount to a subsequent judgment which is first enforced; and if it be enforced by a bill in equity to which the owner of the second judgment, or of the title acquired under it, is not made a party, such junior judgment creditor, or the purchaser under his execution, would have the right to redeem even after the statutory period of redemption had expired, because his rights would not be cut off by a foreclosure suit to which he was not made a party. This point is illustrated by one phase of the litigation in respect to the La Crosse and Milwaukee Railroad Company, afterwards the Milwaukee and Minnesota Company, and the Milwaukee and St. Paul Railway Company.[2] Without following in detail the complicated facts of the case, the legal point is made clear by the illustrations and reasoning of Mr. Justice Dyer. "Suppose a second mortgagee forecloses his mortgage and takes title under his foreclosure sale, but does not take possession. Suppose then a prior mortgagee forecloses his mortgage, does not make the second mortgagee a party, takes title under his foreclosure sale and gets possession, who has the paramount legal title? Clearly the prior mortgagee, but the second mortgagee's right of redemption is not cut off, because he was not a party to the proceeding. Let us follow it further. Suppose the prior mortgagee forecloses his mortgage, does not make a second mortgagee a party, and gets title under a fore-

[1] Searles *v.* Jacksonville, Pensacola & Mobile R. R. Co. 2 Woods, 621.

[2] Howard *v.* Milwaukee & St. Paul Ry. Co. 7 Biss. 73. And see Railroad Co. *v.* James, 6 Wall. 750; Bronson *v.* La Crosse & Milwaukee R. R. Co. 2 Wall. 283.

closure sale. The second mortgagee is in possession holding title under a foreclosure of his mortgage. The paramount title is again in the prior mortgagee, but he cannot have a writ of assistance or other process in his foreclosure proceeding against the second mortgagee to get possession of the premises, because that second mortgagee was not a party to his suit.[1] The equity of redemption of that mortgagee is not cut off, and if the prior mortgagee would get possession, in case the second mortgagee does not redeem, he must bring ejectment. I mention these only as illustrations of the general principle. Now a judgment creditor with a posterior lien issues execution, sells the property, and takes title. A prior judgment creditor prosecutes his bill in equity to enforce the lien of his judgment. The party in possession is sole defendant in the bill. A decree is rendered, enforcing not any lien created by the decree, but the lien of the judgment as of the date of the judgment, and a sale is ordered. The sale transpires, and then a contest arises upon the legal titles held respectively by the purchaser under the decree and the purchaser under the execution sale upon the subsequent judgment. I cannot come to any other conclusion than that the purchaser under the decree founded upon the first judgment in this state of the case takes the paramount legal title. True, the plaintiff was not a party to the bill filed upon the prior judgment, but the omission to make him a party did not give him superior legal rights. For rank of legal title we must look to the judgments from which the respective titles flow."

443. As a general rule it is neither necessary nor proper to make prior mortgagees parties to a foreclosure suit.[2] Of course if the prior mortgagees assent to a sale of the entire property, and such a sale is desired, they must be made parties to the bill. It may sometimes be necessary to make prior mortgagees parties in order to settle the amounts for which their mortgages are liens upon the property, as otherwise a purchaser at the foreclosure sale cannot know before bidding what the value of the property to be sold may be; and the complainants in the bill should put themselves in a position to inform purchasers what is the actual amount

[1] See, on this point, Terrell *v.* Allison, 21 Wall. 289; Hickey *v.* Stewart, 3 How. 750.

[2] 2 Jones on Mortgages, § 1439; Rose *v.* Page, 2 Sim. 471; Richards *v.* Cooper, 5 Beav. 304; Payne *v.* Hook, 7 Wall. 432; Jerome *v.* McCarter, 94 U. S. 734, 736.

of prior incumbrances.[1] In the case of ordinary mortgages, it is seldom necessary to resort to any legal proceeding to determine the amount of the prior incumbrances; but with railroad mortgages this necessity more often arises, especially when there have been successive mortgages of portions of a road and afterwards of the entire road or of a consolidated road; or when other complications have arisen to render the amounts for which the mortgages are valid liens uncertain.

To make the prior mortgagee a party, unless there is a voluntary appearance, there must be a service of process upon him. A railroad mortgage is usually made to trustees, who represent the bondholders in all matters affecting their rights in court. But sometimes the bondholders are themselves the mortgagees, and in such case service of process must be made upon the individual bondholders in order to make them parties defendant. No general notice calling on them to present their claims will make them parties or bind them. If they are represented in the case by trustees, then a notice calling upon them to present their bonds before the master would be binding. But if they are in no way represented in the suit, their rights are not affected by any decree that may be rendered in the case.[2]

So long as a doubt exists as to the character and extent of a mortgage lien, a court of equity will not expose the property to sale under it, if the interest be capable of being reduced to a certainty.[3] In like manner where the effort of the junior mortgagee is to obtain a sale of the entire property or estate, and not merely of the equity of redemption, there is reason for making the prior incumbrancers parties, for they have an immediate interest in the decree.[4]

A decree, declaring a mortgage to be a first lien upon the property and franchises of a railroad company, gives it no precedence over the prior lien of a party who had no notice of the proceedings and was not a party nor privy to the decree.[5]

444. Upon the foreclosure of a mortgage upon a distinct

[1] Richards *v.* Chesapeake & Ohio R. R. Co. 1 Hughes, 28, 35.

[2] Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606, per Woods, J.

[3] Sutherland *v.* Lake Superior Ship Canal, R. R. & Iron Co. 1 Cent. L. J. 127; Jerome *v.* McCarter, 94 U. S. 734.

[4] Per Strong, J., in Jerome *v.* McCarter, *supra*.

[5] Pittsburg, Cincinnati & St. Louis Ry. Co. *v.* Marshall, 85 Pa. St. 187.

portion of a railroad, the mortgagee of another distinct portion is not a necessary party. When the mortgagees of distinct divisions of the road both claim the same property, as for instance the machinery, rolling stock, franchises, and privileges of the entire road, the question what the mortgages cover is one which cannot be determined in a suit for foreclosure brought by one of the mortgagees.[1]

445. **Individual stockholders are not generally allowed to become parties** to a foreclosure suit against a railroad company. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defence.[2] "But this defence," says Mr. Justice Nelson, "is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and should be permitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong."

The stockholders of a corporation need not be individually made parties to a suit by its creditors to obtain satisfaction out of surplus proceeds of a foreclosure sale, where the stockholders are represented both by the corporation and by a committee of their own.[3]

446. **Where a stockholder may intervene.** — After a suit in equity has been properly instituted against a railroad company, its officers enjoined and a receiver appointed, a decree *pro confesso* entered, and an authentic report of the facts made to the court, which has thereupon ordered a sale of the property of the

[1] Bronson *v.* Railroad Co. 2 Black, 524.

[2] Bronson *v.* La Crosse & Milwaukee R. R. Co. 2 Wall. 283.

[3] Railroad Co. *v.* Howard, 7 Wall. 392.

company, an individual stockholder cannot be permitted to intervene in the suit and file a cross-bill in the cause on a general charge of fraud and collusion on the part of the receiver, and an erroneous judgment on the part of the court in making the order. The receiver of the Memphis, El Paso, and Pacific Railroad Company reported, among other things, that prior to the late civil war the company had surveyed a route from the eastern boundary of Texas to El Paso, and had graded about sixty-five miles of its road, but had not paid the contractor; that after the war, about twenty or twenty-five miles of road had been graded, about three miles of track had been laid down, and loose rails had been dropped along the line for a few miles further. "Ten locomotives, purchased in France, together with a lot of about one hundred and twenty tons of railroad iron, had been detained at New Orleans for non-payment of duties, which, in the case of the locomotives, exceeded their value. The other railroad iron had been sold or attached in New York for claims against the company. This, from the report of the receiver, seemed to have been the whole extent of the real operations of the company in the construction of its vast work across the whole northern portion of Texas, an extent of nearly a thousand miles, and in the accomplishment of this result, or at least so much of it as had been performed since the close of the war, there had been issued forty millions of stock and about thirteen millions of bonds and land certificates." Nothing else remained, as the result of this vast issue of securities, which the receiver could lay his hands on except a few thousand shares of stock in two other railroads, and a residuum of less than three hundred thousand dollars of cash assets accruing from the sale of land grant bonds in France to the amount of over $5,000,000, under a representation and pledge that the money should be devoted to the construction of the road, so as to secure the grant of lands which formed the basis of the mortgages and the only security for the payment of the bonds. "A more utterly fraudulent concern, a more empty bubble of speculation, is rarely to be met with in this highly speculating and fraudulent age," was the comment of the court upon this humiliating revelation of the facts of the case. And yet it appeared that the franchises and rights to grants of land belonging to the organization would be of much value in the hands of an honest and energetic organization; and the receiver reported

an agreement which could be effected with a new company which would have the effect of securing the ultimate payment of the debts and obligations of record of the defendant company. This proposition, after being taken under consideration by the court and modified in some particulars, was approved, and the receiver was authorized to carry it into execution.

At this stage of the proceedings certain officers and stockholders of the company appeared and desired to be allowed to become parties to the suit, and to intervene for their respective interests. The order authorizing the receiver to effect the proposed sale was suspended until the interveners could formally present their case by petition or cross-bill, and be heard. The complainants in the suit and the receiver thereupon applied for a rule to show cause why such order should not be vacated and set aside, and this was the question before the court in the present case. The petitioners objected to the proposed sale, and made general charges of fraud and collusion on the part of the receiver. But the court held that individual stockholders could not be allowed to intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit.[1] Mr. Justice Bradley, of the Circuit Court of the United States, said: "Rival creditors, by proceedings before a master, may control the priority of their respective liens, and creditors or stockholders may contest the validity of claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit; to obtain administration of the company's assets and property. To be allowed to intervene as general defendants and contestants is another and different thing. This can be admitted only upon the ground before referred to, to wit: having an interest in the results as a stockholder or otherwise, and being able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. A suggestion, in the progress of the suit, that an officer of the court is disposed to act fraudulently, or that the court has made an injudicious or erroneous order, will not be a sufficient ground to allow such a party to intervene. Indeed, it is questionable whether, in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit,

[1] Forbes *v.* Memphis, El Paso & Pacific R. R. Co. 2 Woods, 323.

and seek to defend or control the proceedings. An original bill would rather seem to be the proper mode of proceeding.

"A commercial, or other business corporation, is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity, totally distinct from that of any or all of its members considered as individuals. A corporation is a person. Its property is not the property of its stockholders. Its rights are not their rights. They have only an indirect interest therein. The rights of a stockholder are to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose. If the company become insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. I do not know of any other rights, except incidental ones, subsidiary or auxiliary to these. Of course, a stockholder has ordinarily a right to a certificate for his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company, he may sue at law or in equity, according to the nature of the case. But all remedies for injuries to the property or rights of the company must be prosecuted in the name of the company, and all demands against the company must be prosecuted against the company by name, unless its officers or agents, by fraud and misrepresentation, have rendered themselves personally liable. A stockholder, in his character of stockholder, cannot sue, nor, unless specially made liable by the charter, can he be sued for any of the company's transactions. There is one case, and one only, in which he can interpose, and that is where the officers and managers of the company, by fraud and collusion with third persons, are sacrificing, or are about to sacrifice and betray the interests of the corporation. For such breach of trust and conspiracy he can call the guilty parties to an account in a court of equity. In the case before the court, the complainants might possibly have held the officers and agents of the company personally liable for the frauds and misrepresentations charged against them. But the said officers and agents were clothed with all the authority and power of the corporation, and negotiated and operated in its name, and issued its obligations upon its corporate credit, and in every official way involved and pledged its corporate liability, and

being the legal representatives of the corporation, placed before the world as such by the corporation, the parties injured had a perfect right to proceed against the corporation for redress. It cannot be, and is not seriously pretended, that the principal complainants in the case, the trustees of the land grant mortgages and bondholders, are acting in collusion with the officers of the company, or that they have any other object in view than the protection and security of the bondholders, who, it is admitted, have been most outrageously defrauded out of their money." The admission of a stockholder to become a party defendant in any case where he is not made so by the bill, being a matter of discretion with the court, to be exercised with caution, and only as an extreme remedy, the court did not deem it necessary to depart from the general rule in this case, where the interests of all parties, and especially of the *bonâ fide* creditors of the corporation, were obviously coincident with the objects of the suit, and the order of sale which had already been made.

447. Adverse interests as between co-defendants may be passed upon and decided; and parties are often made defendants because they will not join as plaintiffs, and are yet necessary parties to the suit, in order that they may be bound by the decree. Having in this way an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights passed upon by the court.[1]

When a right of priority is in dispute it ought to be settled before a sale, so that the party holding the first incumbrance can bid upon the property up to the amount of his claim.[2]

448. It is a general rule that strangers to a cause cannot be heard in it either by petition or motion. Their remedy is by original bill. But there is an exception to the rule as regards creditors who are allowed to prove debts, and persons belonging to a class on whose behalf a suit is brought, as for instance bondholders for whom mortgage trustees have brought an action for foreclosure. Such persons are regarded as *quasi* parties, and of course have a standing in court.[3]

[1] Corcoran *v.* Chesapeake & Ohio Canal Co. 94 U. S. 741.

[2] Campbell *v.* Texas & New Orleans R. R. Co. 2 Woods, 263.

[3] Anderson *v.* Jacksonville, Pensacola & Mobile R. R. Co. 2 Woods, 628.

III. *Defences.*

449. In general. — In a bill to foreclose a mortgage given to secure negotiable railroad bonds, as against *bonâ fide* purchasers of the bonds for value, no other or further defences to the mortgage are allowed than would be allowed were the action brought in a court of law upon the bonds. Such bondholders, in this respect, stand in the same position as *bonâ fide* assignees for value and before maturity of negotiable promissory notes.[1]

450. A junior mortgagee cannot deny the validity of a prior mortgage which he has assumed. — Where a mortgage of a railroad is made in express terms subject to a prior mortgage of the same property, securing bonds negotiable in form, and which have in fact passed into circulation before the making of the junior mortgage, the junior mortgagees, and all parties claiming under them, are estopped from denying the amount or the validity of such bonds.[2]

451. Subsequent contracts of the company. — Until a mortgagee takes possession under his mortgage, or files a bill to foreclose it, and obtains the appointment of a receiver, he is in no way responsible for the dealings of the mortgagor with third persons, such for instance as the leasing of a railroad which is the subject of the mortgage, although the lease be fraudulent against the company. Such dealings, after the execution of the mortgage, cannot affect the rights of the mortgagee, and he has no control over them. He has no interest in the earnings of the road, or concern in the appropriation of them, until he takes possession or obtains the appointment of a receiver. Therefore the stockholders of a railway company cannot set up such matters in defence to a foreclosure suit.[3]

[1] Kenicott *v.* Supervisors, 16 Wall. 452; following Carpenter *v.* Longan, Ib. 271.

[2] Bronson *v.* La Crosse & Milwaukee R. R. Co. 2 Wall. 283; and see Minnesota Co. *v.* St. Paul Co. 6 Wall. 742; Jerome *v.* McCarter, 94 U. S. 734.

[3] Bronson *v.* La Crosse & Milwaukee R. R. Co. 2 Wall. 283.

IV. *Decrees.*

452. Decree of sale of railroad situate in two states. — The fact that a railroad company running through two states is incorporated in both does not prevent a court sitting in one of these states from ordering a sale of the entire property situated in both states, under a mortgage of the entire line of road executed by one corporate body. The execution of the mortgage in this way would estop the corporation from setting up a separate existence in the two states. Moreover, there is no reason why a corporation chartered by two states may not constitute one and the same corporate body.[1] Mr. Justice Strong, delivering the judgment of the Supreme Court of the United States, in favor of the validity of such a decree, said:[2] "If such a foreclosure and sale cannot be made of a railroad which crosses a state line and is within two states, when the entire line is subject to one mortgage, it is certainly to be regretted; and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, — streams that are boundaries of two states. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads partly in one state and partly in an adjoining state, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the state, it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from

[1] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 447, 454; McElrath *v.* Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.

[2] Muller *v.* Dows, 94 U. S. 444, 449. See §§ **413, 414**.

the ownership of another part. And the franchise of the company is not capable of division.

"In view of this, before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may enforce the decree by process against the defendant. True, it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants."

In New Jersey[1] it is provided by statute that railroad corporations existing by or under the laws of another state, any part of whose route, whether acquired by lease or otherwise, lie within this state, or which are authorized to exercise any franchises within this state, shall be deemed corporations of this state, for the purpose of being sued or proceeded against if insolvent, in the same manner and to the same extent as if organized originally therein, and no suit of foreign attachment shall be brought against any such corporation. In case suit shall be brought for the foreclosure of any mortgage of the franchises and railroads of any such corporation in the state of its original creation and domicil, and also of the same mortgage in the Court of Chancery of this state, the suit in the Court of Chancery shall, so far as consistent with the protection of parties having acquired liens in this state, be regarded and conducted as auxiliary to the said suit brought in said state where such corporation was originally created and domiciled; and, upon decree obtained in the last mentioned suit for the foreclosure of such mortgage, and for the sale of the property and franchises thereby conveyed, including such property and franchises in New Jersey, to pay and satisfy the mortgage and other liens which may be established by such decree by such officers as shall be designated therefor, the Court of Chancery in this state shall be empowered so to frame its decree for foreclos-

[1] Laws 1876, ch. 78, §§ 1, 2; 2 R. S. 1877, p. 921, §§ 71–81.

ure and sale under said mortgage, to satisfy the same and such other liens which by its said decree it shall establish, as that sale may be made thereunder, out of this state, and at the same time and place of the sale under the judgment or decree obtained in said other state, and under such regulations as to advertisement thereof as to the chancellor shall seem fit.

453. Decrees entered by consent, in like manner as decrees in *ex parte* cases, so long as they remain unexecuted, are subject to the control of the court. Such decrees have legal effect so long as they stand unreversed; but in fact they are the agreements of the parties, which the court merely assents and gives effect to, and are not judicial determinations.[1] So long as such decrees have not been acted upon the court is at liberty to correct them according as the court may afterwards judicially ascertain the facts and the laws. But this power does not exist after such decrees have been carried into effect. They are then regarded as final, and estop the parties and their privies from calling them in question.[2] A consent decree entered upon the basis of an agreement between the parties, by which the execution of a decree against a railroad company was suspended upon certain terms, must be executed by the company when the other party has complied with the agreement on his part. Where, by such a decree, the railroad company was to pay certain instalments of a debt at certain dates until the whole was paid, and if default was made the complainants were to wait ninety days before making a seizure and sale of the property, proceedings for sale after the ninety days' indulgence will not be stayed, except upon some ground founded upon the agreement; the company must show a desire or willingness to comply with the substance of the agreement. The equities of third parties are no ground on which to base such a petition.[3]

454. When a decree made by consent is beyond the scope

[1] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. 50 Vt. 500; 14 Am. Railw. R. 497, 531, per Barrett, J.

[2] Wadhams *v.* Gay, 73 Ill. 415; Edgerton *v.* Muse, 2 Hill (S. C.) Ch. 51; Farmers' Loan & Trust Co. *v.* Central R. R. of Iowa, 4 Dill. 533. And see, further, Union Bank of Louisiana *v.* Marin, 3 La. Ann. 34. "Consent decrees decide nothing. They merely authenticate private agreements, and render them executory between the parties." Per Rost, J.

[3] Anderson *v.* Jacksonville, Pensacola & Mobile R. R. Co. 2 Woods, 628.

of the original bill, and not in accordance with settled principles of law, although the parties are bound by it after it has been acted upon by either of them, yet the court not having made the decree in the exercise of a judicial judgment or deliberation will not be bound to regard it beyond the specific matter which is the subject of the decree. The court is free to adopt a different policy at a subsequent stage of the case. Thus, in the case of the Vermont Central Railroad Company,[1] after a receiver had been regularly appointed by the court, and had been in possession of the road for some years, the parties made a compromise which in fact discharged the debt for liquidation of which the receivership was created, so that the occasion for the receivership no longer existed. This compromise "was devised and put in form as the outcome of the mind and will of the parties, as the mode of consummating into validity a mutual arrangement by the parties as to their respective rights and interests, and as to the mode and means by which the property was to be held and used in serving and satisfying those rights and interests. That decree adopted what had been created by the court as a receivership, as known and warranted by the law; but the administration of it was not left to the judicial judgment and direction of the court under the law authorizing and governing a receivership, known to the law as such. Instead thereof the parties enacted a code *ex contractu* for the administration of the property, and provided *ex contractu* that there should be the formality as of a decree supervening thereupon." The administration proceeded for ten years or more before there was any adverse litigation between the parties, during which time there were many ancillary decrees and orders mainly agreed upon by the parties. Such administration, although called a receivership in the proceedings, and having the form of one, was practically one by agreement of the parties. The court did not exercise its own prerogative and control except in subordination to the agreement of the parties. Its function was virtually the giving of formal assent to what had been devised and agreed upon by the parties. The court, therefore, upon the occurrence of adverse litigation at a later stage of the cause, did not hesitate to declare that this receivership was not a receivership in law. "The court could not, in the first instance, bind by judgment, decree, and

[1] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. 50 Vt. 550, 564; 14 Am. Railw. R. 497, 538, 560.

order, beyond the scope of the original bill, except by consent, and by acquiescence in the execution thereof, and it would be without warrant for the court to supervene upon what has come to pass in virtue of agreement, consent, and acquiescence, and deal with the subject and the parties the same as if all had been done within the scope of the original bill and under the original decree, in the legitimate exercise of judicial prerogative, in the discharge of judicial duty, and as the result of independent judicial judgment."

455. Final decree. — A decree in a foreclosure suit fixing the amount of interest due on a mortgage, and providing for a sale unless payment be made within a year, is a final decree from which an appeal may be taken.[1] But a decree which does not fix the amount due upon the mortgage, nor ascertain and define the property to be sold under the decree, is not final in the sense which allows an appeal from it.[2]

After an injunction restraining a sale under a deed of trust, a decree dissolving the injunction, and directing a sale according to the deed of trust, and the bringing of the proceeds into court, is a final decree from which an appeal may be taken.[3]

An order appointing a receiver is a final order from which there may be an appeal.[4]

[1] Milwaukee & Minn. R. R. Co. *v.* Soutter, 2 Wall. 440; Blossom *v.* Milwaukee, &c. R. R. Co. 1 Wall. 655; and see Hinckley *v.* Gilman, Clinton & Springfield R. R. Co. 94 U. S. 467.

[2] Railroad Co. *v.* Swasey, 23 Wall. 405.

[3] Railroad Co. *v.* Bradleys, 7 Wall. 575.

[4] Cincinnati, Sandusky & Cleveland R. R. Co. *v.* Sloan, 31 Ohio St. 1.

CHAPTER XV.

THE APPOINTMENT AND JURISDICTION OF RECEIVERS.

I. Grounds for the appointment of receivers, 456–479.
II. Selection of receivers, 480–482.
III. Jurisdiction of receivers, 483–492.

I. *Grounds for the Appointment of Receivers.*

At the present time when so many railways in the United States are in the hands of receivers, the subject of their appointment, rights, and liabilities is one of interest, not only to creditors and others immediately interested in the insolvent companies, but, in at least one aspect, to the business community generally; for one of the questions constantly arising in the operation of roads by receivers relates to the extent of their liability, or of the liability of the funds in their charge, for loss and damage done to goods carried by them, and for the negligence of employees whereby injury happens to passengers. The whole subject is one of recent growth, and many of the most important decisions embraced within it have been rendered within two or three years. Without dealing much with elementary matters, the present chapter will present so much of the subject as relates to the appointment of receivers and their jurisdiction over the property, and the succeeding chapter will relate to their duties and liabilities.[1]

456. The English rule in regard to the appointment of receivers at the suit of a mortgagee formerly was[2] that a senior mortgagee could not generally obtain such appointment, because,

[1] It is neither practicable nor desirable to embrace in this treatise the whole subject of the Law of Receivers. For the general law of this subject, reference may be had to the excellent work of Mr. High. The subject is developed here only so far as it relates directly to the enforcement of corporate securities.

[2] Doe *v.* St. Helen's, &c. Ry. Co. 2 Q. B. 364; Potts *v.* Warwick & Birmingham Canal Co. Kay, 146; Bowen *v.* Brecon Ry. Co. L. R. 3 Eq. 541; Fripp *v.* Chard Ry. Co. 11 Hare, 241; Hopkins *v.* Worcester & Birmingham Ry. Co. L. R. 6 Eq. 447; Ames *v.* Birkenhead Docks, 20 Beav. 342.

having the legal title, he had full remedy at law for the recovery of possession by ejectment. When, however, his interest was such that he could not maintain ejectment, as for instance when that interest was the "undertaking" of a railway or canal company, or the rates, tolls, and dues arising therefrom, he might come into court for a receiver.[1] By statute, the holder of the legal title by mortgage is enabled to obtain the appointment of a receiver in all instances where there has been a default in the payment of the principal debt for one year, or of interest for six months.[2] But, prior to a recent statute upon this subject, it was held that the remedy of a mortgagee of a railway company for the enforcement of the debt did not extend to the obtaining of a receiver to manage and operate the road.[3] The Court of Chancery will, however, appoint a receiver of tolls or earnings of the company when these are liable to the payment of the debt. This is a remedy essentially different from the appointment of a manager of the undertaking. Upon an application to the Rolls Court for a receiver, Sir John Romilly, Master of the Rolls, appointed a receiver of the tolls and rents;[4] but said: "I do not think I can give to the receiver such power of management of the affairs of the corporation as would make him liable to proceedings by the attorney general by mandamus, or the like. I am not aware whether the letting by the receiver, instead of the corporation, would have that effect; but, if it would, then the letting should be by the corporation, but the rents should be secured by the receiver." The appointment of a receiver, at the suit of a mortgagee of tolls, is one of the oldest remedies of the court, and not dependent upon any statute.[5]

In a case before the English Court of Appeal in Chancery,[6] upon the question of appointing a receiver of a railway company in behalf of mortgagees, Lord Cairns said: "In addition to the

[1] Doe *v.* St. Helen's, &c. Ry. Co. *supra.*

[2] 23 & 24 Vict. c. 145, §§ 11–32. By the Judicature Act of 1873, a receiver may be appointed by an interlocutory order of the court, in all cases in which it shall appear to the court to be just or convenient that such order should be made. 36 & 37 Vict. ch. 66, § 25, subs. 8.

[3] In consequence of the refusal of the Court of Chancery to give this remedy, statute was enacted, in 1867, for the appointment of a manager of a railway company, at the suit of a judgment creditor.

[4] De Winton *v.* The Mayor, &c. of Brecon, 26 Beav. 533.

[5] Hopkins *v.* Worcester & Birmingham Ry. Co. *supra.*

[6] Gardner *v.* London, Chatham & Dover R. Co. 2 L. R. Ch. 201, 212.

general principle that the Court of Chancery will not in any case assume the permanent management of a business or undertaking, there is that peculiarity in the undertaking of a railway which would, in my opinion, make it improper for the Court of Chancery to assume the management of it at all. When parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred. The company will, of course, act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not, by agreement, hand over the management of the railway to the debenture holders. It is impossible to suppose that the Court of Chancery can make itself or its officer, without any parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management. It is said that the railway company did not object to the order for a manager. This may well be so. But, in the view I take of the case, the order would be improper even if made on the express agreement and request of the company."

457. In the United States, courts of equity have exercised their powers with much more freedom in the appointment of receivers of railways. There has, unfortunately, been much occasion for the exercise of their jurisdiction in the temporary management of the roads of insolvent companies. Instances are not wanting where courts have, through their receivers, retained the management of such roads through a long series of years; and the propriety of this course has frequently been assailed. Generally, however, the doctrine is fully recognized that courts assume the management of railroads only with a view to the winding up of insolvent companies, or to the sale of their property for the benefit of the mortgage creditors; that, in the larger class of cases, justification of the appointment of a receiver springs out of the jurisdic-

tion of courts thus to liquidate and sell; and that, in these cases, roads are managed and their business continued, through the intervention of receivers, in order that the roads may be sold without loss of business and depreciation of the property.[1] In this way the property is preserved, pending the litigation, and used for the benefit of all concerned, with the ultimate purpose of disposing of the property itself, and obtaining assets with which to pay off the mortgage upon foreclosure of it. There are other circumstances which will justify the interference of a court of equity by the appointment of a receiver; as for instance when a company receiving income more than sufficient to pay the expenses of an economical management refuses to apply the surplus to the payment of a judgment or mortgage which is a lien upon its property.[2]

In some states courts of equity are fortified in their assumption of the management of insolvent railroad and other corporations by express statutes. But, without the aid of a statute, the chancery jurisdiction of the courts is sufficient for the exercise of this authority in all instances where their interference is necessary to protect the property or to enforce the right of persons interested in it, whether creditors or stockholders.[3] "It is not unusual," said Mr. Justice Swayne, of the United States Supreme Court,[4] "for courts of equity to put receivers in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interest of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid."

In several states it is provided by statute that in an action by a mortgagee for the foreclosure of his mortgage and the sale of the mortgaged property, a receiver may be appointed where it appears

[1] Milwaukee & Minnesota R. R. Co. *v.* Soutter, 2 Wall. 510; *S. C.* Woolworth, 49; Florida *v.* Jacksonville, Pensacola & Mobile R. R. Co. 15 Fla. 201, 286.

[2] Covington Drawbridge Co. *v.* Shepherd, 21 How. 112; and see Stevens *v.* Davison, 18 Gratt. (Va.) 819.

[3] Stevens *v.* Davison, 18 Gratt. (Va.) 819.

[4] Davis *v.* Gray, 16 Wall. 203.

that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.[1]

In Michigan a court of chancery cannot take from the directors of a corporation or vest in a receiver the management and control of the corporate business, except in proceedings to dissolve the corporation under a statute providing therefor. An *ex parte* appointment of a receiver to manage the corporate business, or an *ex parte* granting of an interlocutory injunction to deprive the directors of control, is more than irregular; it is absolutely void, being entirely beyond the power of the court.[2]

458. **The appointment of a receiver is an equitable remedy,** and has been said to be in effect an equitable execution.[3] This remedy is a provisional one also, and bears a similar relation to courts of equity that proceedings in attachment bear to courts of law. "The issuing of an attachment and the appointment of a receiver in a civil action are both proceedings which are merely ancillary or auxiliary to the main action. The action may be prosecuted to final judgment, either with or without such proceedings. These auxiliary proceedings are merely intended to secure the means for satisfying the final judgment in case the plaintiff should succeed in the action, and they can only be resorted to where the special circumstances exist which the law prescribes for their institution."[4]

The appointment of a receiver of a railroad company in a foreclosure suit does not follow a default in the payment of interest as a matter of course, but is a matter of sound discretion with the court. Although the mortgage provides that the trustee, on default of payment of either principal or interest of the bonds, may take possession of the property, yet when the aid of a court of

[1] **California,** Codes & Stats. 1876, ch. 5, § 10,564; **Arkansas,** Digest 1874, p. 838, § 4810; **Kentucky,** Code of Practice 1876, § 299; **Dakota T.,** Code of Civil Procedure 1877, § 219; **Montana T.,** Laws 1877, p. 93; Code of Civil Procedure, § 221; **Washington T.,** Laws 1877, p. 40; **Wyoming T.,** Compiled Laws 1877, ch. 13, § 253, of Civil Code; **Ohio,** R. S. 1860, p. 1019. For statute authorizing appointment of receivers in **New York,** see 3 R. S. 1875, p. 511, § 244.

[2] Port Huron & Gratiot Ry. Co. *v.* Judge of St. Clair Circuit, 31 Mich. 456.

[3] Jeremy's Eq. Jur. 249.

[4] Cincinnati, Sandusky & Cleveland R. R. Co. *v.* Sloan, 31 Ohio, 1, per White, J.

equity is invoked it will look into the facts and exercise an equitable discretion.[1]

459. Upon an application for a receiver by mortgage creditors, it is generally necessary to show something more than the fact that a default has occurred in the payment of interest; as for instance to show that ultimate loss is likely to happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale.[2] The appointment of a receiver is a matter within the sound discretion of the court, and the power is exercised in behalf of railway bondholders only in strong cases; and only upon its appearing that the property is insufficient to pay the debt, and that the mortgage creditors are in danger of suffering irreparable loss.[3] Urgent occasion for the appointment of a receiver to manage and operate a railroad should be shown before the court exercises its authority in this way. Mr. Justice Miller, of the Supreme Court of the United States, in reference to the exigencies which justify the exercise of this prerogative of a court of chancery, said[4] that the appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers, the exercise of which can only be justified by the pressure of an absolute necessity.

Such a necessity did not exist in the case before him: "The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to enforce the payment of a judgment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are

[1] Jones on Mortgages, § 1516; Williamson *v.* New Albany, &c. R. R. Co. 1 Biss. 198.

[2] Williamson *v.* New Albany R. R. Co. 1 Biss. 198; Union Trust Co. *v.* St. Louis, Iron Mountain & Southern R. R. Co. 4 Dill. 114; 4 C. L. J. 585; Cheever *v.* Rutland & Burlington R. R. Co. 39 Vt. 653; Burlingame *v.* Parce, 12 Hun (N. Y.), 144.

[3] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35; Milwaukee & Minnesota R. R. Co. *v.* Soutter, 2 Wall. 510; Vose *v.* Reed, 1 Woods, 647; Frisbee *v.* Timanus, 12 Fla. 300; Florida *v.* Jacksonville, Pensacola & Mobile R. R. Co. 15 Fla. 201, 286; Cincinnati, Sandusky & Cleveland R. R. Co. *v.* Sloan, 31 Ohio St. 1.

[4] Milwaukee & Minnesota R. R. Co. *v.* Soutter, 2 Wall. 510; and see Delaware, Lackawanna & Western R. R. Co. *v.* Erie Ry. Co. 21 N. J. 298.

open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars' worth of property of such peculiar character as railroad property is from its rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court."

To the same effect Mr. Justice Barrett, of the Supreme Court of Vermont, says:[1] "It is a fundamental element in any idea of a receivership under the law that there should be such a necessity for it as to render it the duty of the court, in the exercise of its judicial judgment upon the case presented, to exert its prerogative in that behalf, and create the receivership in the discharge of that duty. It is never to be created because it will do no harm; nor even because it will do good, unless the exigency be such as to impose the duty upon the court."

460. **Whether a receiver should be appointed is a question often attended with difficulty,** and to answer it properly is one of the most embarrassing duties a Court of Chancery has to perform. This was the remark of Judge Drummond in a cause before the Circuit Court of the United States, which presented peculiar and unusual difficulties. A bill had originally been filed by a mortgage trustee for a foreclosure of the mortgage and a sale of the property. After the case had been pending some time, a compromise agreement was made for a reorganization of the company, and a decree was entered by consent ratifying the agreement. This contemplated, with other things, a surrender of a portion of the bonds and their conversion into stock; and, of course, could be made effectual only by the voluntary action of all the bondholders. The property was placed in the hands of a trustee to carry out the orders of the court. Various interlocutory orders were made in the case from time to time. After some years the trustee and some of the bondholders applied to a state court for a foreclosure of the same mortgages, and that court appointed a receiver, and decreed a sale, which was completed and the road delivered to the purchasers. In this situation of affairs a bondholder, who had not come into the compromise agreement, applied to the Circuit Court for the appointment of a receiver, and that court having decided that it had not lost control of the subject matter of the suit, and

[1] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. 50 Vt. 500; 14 Am Railw. Rep. 497, 544.

that the interference of the state court in dealing with and disposing of property at the time within the jurisdiction of the Circuit Court was unauthorized, the only inquiry remaining was, therefore, whether a receiver should be appointed pending the settlement of the rights of the parties by the court. The company was insolvent, the former trustee was dead, having made no reports to the court of the manner in which he had performed his trust; the new trustee had been a party to the litigation in the state courts, and had sought to dismiss the proceedings in the Circuit Court. The parties then in possession of the road were acting in hostility to the decrees of the Circuit Court, and the interests therein adjudicated. The court, therefore, deemed it impossible to give any relief to the petitioner and others in similar relations, unless the court should take possession of the property; and a receiver was accordingly appointed.[1]

461. That a receiver will not be appointed upon the application of a mortgagee, as a matter of course, upon a default is illustrated by the case of the St. Louis, Iron Mountain, and Southern Railway Company. This company owed its existence to the consolidation of several other companies, which had largely built the road before they were absorbed in the present corporation.[2] Each of the four companies which became so consolidated was already heavily mortgaged, and the new corporation executed a mortgage of its property and income, and franchises, for $28,000,000, chiefly for the purpose of taking up the existing mortgages. Only about $2,000,000 of the old bonds were exchanged for the new, and it was soon apparent that the company could not complete its road and pay the interest on its bonded debt, and consequently an arrangement was made by which the interest coupons on all the bonds for two years were funded. During this time the road was completed, the floating debt considerably reduced, and the income of the road each year had increased; but the company was unable to pay in full the coupons first maturing after this period. In this condition of things the agents of Baring Bros. & Co., who were very large creditors of the company, proposed that half of each coupon should be paid, relying on the leniency of the holders for such extension of time

[1] Bill *v.* New Albany, &c. Ry. Co. 2 Biss. 390.

[2] Union Trust Co. *v.* St. Louis, Iron Mountain & Southern R. R. Co. 4 Dill. 114; *S. C.* 4 C. L. J. 585.

for the other half as should be necessary. This plan was accepted and acted upon by nearly all the creditors; but the above named creditors had apparently changed their purpose, though no notice of such change appears to have been given; for their coupons were presented for payment, and payment of half of each having been tendered, it was refused, and a bill for foreclosure was immediately filed, with an application for the appointment of a receiver. The bill alleged that the road was insolvent; that there was danger that the prior divisional mortgages would be foreclosed on the separate parts of the road, and the road, which was valuable as a whole, would be rendered no security at all for the debt of the complainants; and that the income of the road which should be appropriated to the payment of the interest would be diverted to the payment of the floating debt of the company on part of which the directors of the company were personally liable.

These allegations were controverted by the answer, which claimed that the road was yielding a net income of six per cent. on $28,000,000, while its entire debt was more than $2,000,000 less than that sum; that the income had been steadily increasing for several years; and that besides the road, its rolling stock and appurtenances, the company owned lands apart from the road, but subject to the mortgage, of the value of $8,000,000.

It was insisted in behalf of the complainants, that the failure to pay the interest, and to deliver possession of the road on demand, left no discretion in the court to refuse to place the road in the hands of a receiver; that because the income of the road was pledged for the payment of the bonds, and the trustees were authorized, on failure to pay any instalment of interest, to take possession, the court was required as a matter of law, without regard to the resources of the company, and without reference to any showing of danger of ultimate loss to the bondholders, or of any serious delay of payment, to take possession of the property of the company.

Mr. Justice Miller, delivering the opinion of the Circuit Court of the United States, commenting upon the bill of the complainants, said that it did not ask for any specific performance of the contract to deliver possession of the road to the mortgagees upon default; that it abandoned the right of foreclosure by the power of sale given to the trustees, and sought the safer mode of sale in chancery; that although the surest mode of securing the income of the road may be through a receiver, yet the income is no

more mortgaged than the visible property and franchises of the company, and, unless there is danger of loss to the bondholders, there is no more reason why the income rather than other property of the company should be sequestered. It is also in the power of the court, without appointing a receiver, to require of the defendant the rendering of an account of the income, and, after payment of the necessary expenses, to pay so much as rightfully should be paid upon the debt secured by the mortgage.

The court, while admitting the right of the complainants to foreclose the mortgage, declared that the appointment of a receiver depended upon the danger of ultimate loss to the bondholders, by permitting the property to remain in the possession of its owners until the final decree and sale; that the appointment is a matter of discretion with the court in view of all the circumstances of the case; and that the facts established in this case did not show any such danger of loss to the bondholders as to justify the court in turning over to them, or to a receiver, the possession of the road and property embraced in the mortgage.

462. **A receiver will not be appointed against the wishes and interests of a great majority of the bondholders,** upon the application of a very small minority of bondholders, so long as the property is honestly and successfully managed; but will leave the complainants to their remedy of a decree of sale in accordance with the law and practice in an ordinary foreclosure suit. In such case the equities of the great body of the creditors and stockholders of a railroad company, whose interests would be imperilled by the appointment of a receiver, will be respected in the exercise of the discretionary power of the court to interfere by taking possession of the property, and the complainants will be left to their technical right of foreclosure in the usual course of proceedings. Especially will the court decline to interfere in this way when the result of such interference would be to overturn a funding scheme, which all but a small fraction of the bondholders have agreed upon and are successfully carrying out, and to break up a long line of railroad into several fragments upon which the mortgages were originally given, to the manifest injury of the whole property.

These equities of the great body of the mortgage creditors of a railroad company are well considered and applied by Mr. Justice

Harlan in the recent case of the Wabash Railway Company, before the Circuit Court of the United States for the Seventh Circuit.[1] Each of the six companies originally owning this line of road had at different times, from 1853 to 1869, executed a first mortgage of its own road, the aggregate of these first mortgages being $9,400,000. Second mortgages to the amount of $5,000,000 were executed by several of the original divisions of the road. Upon a consolidation of five of the original companies a consolidated mortgage was executed, and finally, in 1873, upon a further consolidation with these companies of the sixth company, another mortgage, known as the gold mortgage, was executed. Under the latter mortgage there was a foreclosure sale in 1876; whereupon the present Wabash Railway Company was organized from the stockholders of the old company, who put in further capital to the amount of $1,600,000. A further mortgage was executed by the new company in 1877; and furthermore, a funding scheme was proposed and was agreed to by holders of more than four fifths of all the mortgage debts. The main feature of this scheme was the funding of the past due coupons and those maturing so far ahead as November 1, 1878, and issuing therefor scrip certificates, running until the maturity of the bonds from which the coupons were detached, bearing interest at seven per cent. annually, such arrangement not to impair the liens of the bondholders under their respective mortgages. Provision was also made for a sinking fund. Holders of bonds to the amount of nearly $100,000, in 1878, brought a foreclosure suit and applied for the appointment of a receiver. Mr. Justice Harlan, denying the application for a receiver, said: "On the side of the complainant it appears that he is the owner of certain bonds, for the security of which mortgages were executed. In the payment of interest upon those bonds there has been a default. The present managers, in execution of the funding scheme, have been paying interest to those bondholders who have given their assent to that scheme, and decline to pay interest to the complainant and those standing with him, who refuse to become parties to the funding scheme. More than that, the present managers are not applying all of the net revenue arising from the operation of the road to the payment of interest in the order of priority of mortgages, but are applying a

[1] Tyson *v.* Wabash Ry. Co., Chicago Times, July 28, 1878. This opinion was oral, and it is to be regretted that only a newspaper report of it can be presented.

portion to the discharge of obligations created by the last mortgage upon the property. Complainant claims that this is a misapplication of the income, and of itself, in connection with the supposed inadequacy of the security for all the bonds, would make it the duty of the court to take charge of the property by a receiver. The complainant and his colleagues insist that the duty of the managers is to keep down the interest on the first mortgage to the extent of the entire net income of the company ; since that course, they insist, will increase the value of the subsequent incumbrances, and that they have no right, as a condition precedent to the performance of their duty, according to the rights of the parties, to require the complainant and his colleagues to submit to a funding scheme which they do not approve. Upon the other hand we find the vast majority of the bondholders, under all the mortgages, insisting that the funding scheme is the best arrangement for all concerned, and that under that arrangement, faithfully and honestly carried out, the rights of all the parties will be best secured. The company invites complainants to join in that scheme with the large majority of those who have the same character of rights with them. That that scheme is being honestly adhered to and will be carried out in good faith, the evidence does not permit me to doubt. Without stopping to state in detail all the reasons arising out of the evidence for the conclusion I reach, I will say that I cannot doubt that the appointment of a receiver at this time would not only break up this line of railway into its original fragments, but would overturn the funding scheme, thereby destroying a large present income for the great majority of bondholders entitled to preference. It would, in addition, work the financial ruin of all the interests involved in this railroad enterprise, subordinate to the first mortgage bondholders, including the interests of the complainant and those united with him in this suit. Those who will certainly suffer, and who will suffer first, will be the stockholders of the old company, and who became the stockholders in this new organization by advancing $1,600,000. None of the bondholders, who were such when that $1,600,000 was advanced by the stockholders, are here actively seeking the appointment of a receiver. Some of those who are conspicuously moving in that direction became, according to their evidence, the owners of bonds quite recently, and, as we may infer from the evidence, for merely speculative purposes. . . . . The

court cannot, in deference to the mere technical rights of a very small minority of bondholders, lay its hand upon a railroad over six hundred miles in length, running through three great states, and thereby imperil, if not destroy, the interests of those whose rights are entitled to equal consideration with those of the complainant and his colleagues. If the present managers of the road were guilty of any fraud or dishonest practice in their control of this property, I should feel differently. While there are differences between them and some of the bondholders, as to certain matters connected with the discharge of the company's obligations, those differences do not involve the integrity of those operating the railroads. The court is disposed to recognize the absolute necessity of large discretion in the management of such vast property, and in the distribution of the net income arising therefrom ; and it is unwilling, for the present at least, to make honest differences as to such matters the basis for its interference by the appointment of a receiver."

463. In a case where it was shown that no interest had been paid on the first mortgage bonds of a railroad company for about ten years, and that the road had in the mean time changed hands once or twice, the court regarded these facts alone as raising a suspicion that the owners of the road had been very unfortunate, or very reckless, or very unmindful of their duty, and as alone affording a very strong ground for the appointment of a receiver on the motion of the mortgagee.[1] Another important fact established in the case was that the mortgage trustee and some of the bondholders, on several occasions, applied to the president of the company for leave to examine their records, with a view to ascertaining the amount of the company's income and to the disposition made of it, and the application was evaded or denied. In view of the withholding of such necessary and proper information, the court applied the maxim, *Omnia præsumuntur contra spoliatorem.*

In this case the defendant attempted to excuse the non-payment of interest upon the ground that the company had been obliged to provide for other roads with which they had in some way become consolidated ; in constructing additions to their road, and in purchasing rolling stock and equipping a long line of road ; for all of

[1] Pullan *v.* Cincinnati & Chicago Air Line R. R. Co. 4 Biss. 35, 47.

which purposes a very large expenditure in the aggregate had been made. But the court said that even honest inability to pay a debt is a poor excuse when one is sued for it; and that the fact that the defendant company had burdened itself with a vast expenditure and indebtedness subsequently to the mortgage, instead of being any reason why a receiver should not be appointed, was rather one reason for such appointment, inasmuch as the company by assuming such burdens was becoming less and less able to pay the interest upon the mortgage. "But the most remarkable feature in the answer," said Judge McDonald, giving the decision of the court, "as it seems to me, is, that it does not, that I can see, present any feasible scheme for paying this interest at all. Indeed, so far as appears from the answer, it does not seem that the interest will ever be paid voluntarily. A strong desire is evinced to extend the road and raise vast sums for equipping it; but no corresponding anxiety is shown to do anything for the first mortgage bondholders. The answer evidently evinces a design to postpone this matter till the very last. Under all the circumstances, I think the appointment of a receiver would be very proper, if the bill had averred that the mortgaged property was not a sufficient security for the debt; and that without a receiver the bondholders are in danger of irreparable injury. I suppose that in no case of a mortgage ought a Court of Chancery to appoint a receiver, if the mortgaged property is of such value as to render it clear that, on a foreclosure and sale, the debt could all be made. In the present case, the mortgaged property would probably not bring so much on sale." In the case before the court the mortgage covering the earnings of one section of a road, which was one fourth part in length of the whole road, a receiver was appointed whose duty it was made to examine the books and affairs of the road, to ascertain its net earnings monthly, and receive one fourth part of the net earnings of the whole line, and pay this into court for the use of the bondholders. The company and its officers were ordered to give the receivers all proper facilities for this examination, and to render full and fair monthly statements to the receiver under oath, and pay over to him every month a fourth part of the net proceeds.

In a case before Judge McLean, in the Circuit Court of the United States,[1] it appeared on a motion for a receiver in a similar

[1] Williamson *v.* New Albany R. R. Co. 1 Biss. 198.

case that the defendant had failed to pay the semi-annual interest which had fallen due within six months of the time of the filing of the bill; and principally, if not solely, for that single and recent failure, the court, while overruling the motion for a receiver, did what was nearly equivalent to appointing one, in placing the road so far under the control of the court as to require that company to make monthly reports of the net income of the road, and to pay a certain proportion of it into court every month for the use of the bondholders.

464. It is ground for the appointment of a receiver that the mortgaged property is liable to be seized on executions. — The fact that a railroad company is insolvent, and is owing a large floating debt which its creditors are rapidly reducing to judgments, has been regarded as ground for the appointment of a receiver at the instance of mortgage creditors. Upon such judgments the railroad and its appurtenances might be seized piecemeal and the security of the mortgage creditors destroyed. It is true that the seizure of property which is security for the mortgage debts may be restrained by injunction, but it might be necessary to issue as many injunctions as there are creditors. Such a state of facts is regarded as calling for the appointment of a receiver.[1]

465. The conduct of the officers of a corporation may be such as to require the appointment of a receiver to take from them the control of the company's affairs. Thus the court will appoint a receiver upon the application of general creditors of a corporation, whose directors have unlawfully and fraudulently executed a mortgage of its property to secure its stockholders, the company being insolvent, and it being necessary to preserve its property pending the litigation.[2]

A receiver will be appointed upon allegations of gross acts of fraud on the part of the officers of a railroad company by whom its property is likely to be squandered and embezzled. The court in such case will act upon the application of bondholders, of creditors, or of stockholders. The officers of the Memphis, El Paso, and Pacific Railroad Company, a corporation of Texas, were en-

[1] South Carolina Railroad *in re*, before Judge Bond of the Fourth Circuit, 11 Chicago Legal News, 8.

[2] Avery *v.* Blees Manufacturing Co. 27 N. J. Eq. 412.

joined, and a receiver of its property appointed, upon a bill filed by a stockholder, a bondholder, and the trustees for bondholders, under the mortgages of the company, on behalf of themselves and all other stockholders, creditors, and bondholders of the company.[1] An abuse of the corporate franchise, aside from the insolvency of the corporation, may be ground for such interference.[2]

466. **The application of the income of a road to completing and operating it is not a misapplication of the funds of the road which calls for the appointment of a receiver**, especially when so made with the consent and by the advice of a large number of the bondholders. In a case before the Circuit Court of the United States for the District of Indiana,[3] Mr. Justice McLean refused to appoint a receiver in such a case, having regard not only to the interests of the bondholders but also to the general creditors of the company, who were deemed to be entitled to some indulgence in the payment of the deferred interest, because the completion of the road for which the floating debt was incurred had added much to the value of the mortgage security, and had increased the profits of the road; and especially as the work was done on the recommendation of the mortgage trustee who sought the appointment of a receiver. "No change of agency could increase, I am convinced, the efficacy of that already employed on the road. A sale of the property would, in all probability, sacrifice the stock of the road, amounting to between two and three millions of dollars, and more than half if not two thirds of the property of the bondholders. It might enable some one or more persons to purchase the road at an almost nominal consideration. These consequences, I admit, are not to stand in the way of an equitable right, enforced under circumstances of fairness and justice. But if such results may be avoided by a short postponement of the interest, and under a prospect of a speedy payment, I hold myself authorized to do so, under the facts above stated. But I will afford to the bondholders every reasonable assurance that can be required. I will admit an order to be entered that the motion of the complainant for the appointment of a receiver be denied,

[1] Forbes *v.* Memphis, El Paso & Pacific R. R. Co. 2 Woods, 323.

[2] City of Rochester *v.* Bronson, 41 How. (N. Y.) Pr. 78.

[3] Williamson *v.* New Albany, &c., R. R. Co. 1 Biss. 198.

and that the said company, from and after the first day of January next, set aside one half of the net earnings of the road for the payment of the interest of the bonded debt of said company, the other half to be applied to the payment of the floating debt of the company. A report of the gross and net earnings to be made to the court monthly." This order was not to be understood as preventing a renewal of the motion for a receiver upon any new statement of facts.

467. Refusal of trustees to perform the trust. — It has already been noticed that the usual ground of application for the appointment of a receiver of a railway, in behalf of bondholders, is that the mortgagor is insolvent and the property inadequate security for the mortgage debt. But there are other grounds upon which the courts will exercise this power, aside from any apprehended loss to the persons secured. The refusal of the trustees under the mortgage deed to perform the trust, or their misconduct in the performance of it, is sufficient ground for the interference of the court, upon the application of the bondholders, or of any considerable part of them. Thus, upon a default in the payment of interest, if the trustees, without good reason, refuse to take possession of the property and sell it in accordance with the provisions of the mortgage deed, the court will require them to execute the trust, or will appoint a receiver.[1]

Where the mortgage trustees, for more than five months after notice to them by a majority of the bondholders, and request by them to proceed to execute the trust by taking possession and selling the property, neglected to take any steps towards the execution of the trust, although the deed of trust made it their duty to do so, the bondholders have a clear right to apply to the court to compel the trustees to act, or to appoint some one who will. This right is independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust. The application for a receiver in such a case is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms.[2]

[1] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 409; Jenkins *v.* Jenkins, 1 Paige N. Y. Ch. 243.

[2] Per Judge Woods, in Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. *supra*.

468. **A receiver may in some cases be appointed merely for the purpose of securing the profits** accruing from the use of the property, without any ultimate purpose of obtaining assets by a sale of the property, as for instance when the security provided for does not give the creditor any right to sell the property itself, but merely a right to take it into possession and use it until the claim is satisfied from the net profits. In such case the creditor may be unable, without the assistance of the court, to obtain and hold possession of the property, especially when this is a long line of railroad with its appurtenances; and the creditor himself generally seeks the aid of a receivership, and the court as generally grants such aid. But even when the creditor does not seek this aid, but merely to be put in possession of the income of a railroad which is the stipulated security, the court may, in behalf of the debtor, decline to put the creditor into the personal management of a road, for fear that such possession once gained by the creditor may be continued, through his mismanagement of the property or otherwise, longer than would be necessary if the property were managed by a disinterested and efficient officer of the court, who would be amenable to the court for a proper administration of the road, a proper accounting for the proceeds, and a proper application of them to the payment of the debt secured. In such cases a receivership is often indispensable to the enforcement of the lien, and to the protection at the same time of the rights and interests of all parties interested in the property.

469. **Appointment of receiver of insolvent corporation to sell its property.** — In New Jersey it is provided by statute that when the property of an insolvent corporation in the hands of a receiver is incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate pending the litigation, the Court of Chancery may order the receiver to sell it clear of incumbrances at public or private sale for the best price that can be obtained, bringing the money into court, there to remain subject to the same liens and equities of all parties in interest as was the property before it was sold, and to be disposed of as the court may by its decree direct.[1] Under this statute it is held that a sale may be ordered, although the litigation be not distinctly and solely as to

[1] 1 R. S. 1877, p. 192, § 84; Nix. Dig. Supplement, 409; Act of March 13, 1866.

the legality or validity of the incumbrances. It is sufficient that there is a dispute as to the extent to which a mortgage is an incumbrance.[1] As to the mode of sale, the receiver, under this statute, should be vested with large discretionary powers.[2]

The object of the legislature in these acts is declared to be the prevention of loss by the depreciation in value of the property pending protracted litigation. The mischief and the remedy are plainly apparent upon the face of the act. It was not intended to confine the remedy to mischief arising from litigation of any particular character, but to all litigation between incumbrancers respecting the validity, extent, or priority of their liens. The act must be so construed as to suppress the mischief and advance the remedy.[3]

It has been urged that the franchises of a corporation are not within the words of this act; that they are not property, and therefore that they cannot be sold by virtue of the act. Technically speaking, franchises are property, but they are property of a peculiar character, arising only from legislative grant, and are not, in ordinary cases, subject to execution or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature. But construing the original and supplementary acts together, it is apparent that the chancellor has discretionary power to order a sale of the franchises, as well as of the property of insolvent corporations, and that he may order a sale of both clear of incumbrances.[4]

As between trustees for first mortgage bondholders of an insolvent railroad company who are seeking to foreclose an overdue mortgage upon property of far less value than the amount of the debt, and a receiver who applies under this act for an order of sale of the property and franchises free from the lien of the incumbrances, the trustees are entitled to the possession of the property, and to apply the income, if any, to the reduction of their debt, and a court of equity will not interfere with such right, unless the equities of other parties are likely to be prejudiced. The validity and extent of the mortgage can be best determined in the foreclosure suit, and the property can be sold to better ad-

[1] Middleton *v.* West N. J. Line R. R. Co. 26 N. J. Eq. 269, 270.

[2] Potts *v.* N. J. Arms & Ordnance Co. 17 N. J. Eq. 395.

[3] Randolph *v.* Larned, 27 N. J. Eq. 557.

[4] Randolph *v.* Larned, *supra*.

vantage after these questions are disposed of. In such a case no one but the mortgagees are interested, and if they wish to delay the sale pending the litigation, there is no reason why their prayer should not be granted.[1]

470. Appointment of receiver to operate road. — It is also provided by statute in New Jersey[2] that if any railroad company fails to run daily trains on any part of its road for the space of ten days, then the chancellor, upon petition of any citizens of the state, and due proof of the facts, shall speedily appoint a receiver, who by order of the chancellor is empowered and required to take possession of all the real and personal property of such company, and to operate the road and transact its ordinary business in the transportation of freight and passengers for such time as the chancellor may direct; and all expenses incurred thereby are made a first lien on all the earnings thereof prior to any other claim, and the surplus, if any, is distributed as the chancellor may direct.

This act is the creature of public considerations altogether. When a receiver has been appointed under it in behalf of the public, the possession of the road, when given up, should be returned to the company from which it was taken. The right of possession as between two companies, each claiming such right, cannot be determined upon the petition of either. A claim of paramount right of possession by a company other than that from whose possession the road was taken by force of a proceeding of this kind is a matter to be settled between the opposing parties in due course of law upon the surrender of the road to the company from which it was taken.[3]

When a receiver has been appointed under this act, his proceedings will not be stayed to allow an inquiry into the causes of the company's failure to operate the road, and proof that such failure was not attributable to the fault of the company, but to the act of lawless persons, by whom the rolling stock was by force taken out of their possession and withheld from them with a view to compelling the payment of wages due from another company. By the terms of the statute it is obligatory upon the court to take possession of a road and operate it, in order to relieve the public from the

[1] Randolph *v.* Larned, *supra*.

[2] Laws 1874, ch. 27, § 1; 2 R. S. 1877, p. 943. See, also, 1 R. S. 1877, p. 196, § 106.

[3] Long Branch & Sea Shore R. R. Co. *v.* Sneden, 26 N. J. Eq. 539.

effect and consequences of the apparent dereliction of duty on the part of the owners. Whenever the exigency shall have ceased, the court will restore the road to the owners. But until the railroad company satisfies the court of its willingness and ability to operate the road, the receiver will be continued in possession. The public necessity is paramount.[1]

471. When property is in the hands of trustees who hold their office ex officio as high public officers of the state, and especially where one part of the trust involves duties of a public character, the court will be very reluctant to take the fund out of their hands, and place it in the hands of a receiver, and will not do so except for the most cogent reasons, such as gross fraud and imminent danger of the trust fund.[2] The legislature of Florida vested certain public lands, including all swamp and overflowed lands belonging to the state, in the governor, comptroller, treasurer, attorney general, and register, as trustees, to constitute an internal improvement fund, and to serve, amongst other things, as a guaranty of bonds to be issued by certain designated railroad companies, of which the Florida Railroad Company was one, for the procurement of iron rails and rolling stock. A certificate of guaranty was to be placed on the bonds. In case the interest on these bonds, and one per cent. per annum for a sinking fund, were not paid by any of the companies, the trustees were authorized to take possession of and sell the road, appurtenances, and franchises of the company in default, and to apply the proceeds in purchasing up the bonds, or incorporating them with the sinking fund. The powers given to the trustees were large and various. They were authorized to fix the prices of the lands, to make arrangements for draining them, and to promote their settlement and cultivation by allowing preëmptions and other modes of encouragement. The Florida Railroad Company having issued a large number of bonds, which were duly indorsed by the trustees, failed to pay any instalments of interest or of the sinking fund, the trustees seized and sold the road, and with the proceeds of the sale purchased and cancelled a large proportion of the outstanding guaranteed bonds of the company. A holder of bonds of the company not so purchased filed a bill in the Circuit Court of the

[1] Long Branch & Sea Shore R. R. Co. *in re*, 24 N. J. Eq. 398.

[2] Vose *v.* Reed, 1 Woods, 647.

United States for the Northern District of Florida, for relief against the trustees, whom he charged with mismanaging the funds, and against other parties and corporations, whom he charged with complicity in such mismanagement by obtaining fraudulent purchasers of the lands at nominal prices. He also prayed for an injunction and the appointment of a receiver of the trust fund. An injunction was granted, awaiting a hearing of the case upon its merits. Upon the question of appointing a receiver, Mr. Justice Bradley, delivering the opinion of the court, after speaking of the objects of the trust as being the development of the resources of the state, the reclamation of the lands, as well as promoting railroad improvements, said:[1] "Now these public and political objects of the trust make it extremely fitting that the chief executive officers of the state should administer the fund. And it must be a very strong case, indeed, which will induce the court to take the property out of their hands and put it into the hands of its own officers. The legislature has seen fit to intrust the chief officers of the state with these important duties, and it would show a great disrespect to this coördinate branch of the government for the judiciary, on light grounds, to displace these officers from the trust, and to put appointees of its own in their stead." The court will in such case resort to every other coercive means of compelling the trustees to perform their duty before resorting to the extreme measure of a receivership.

472. Whether the Supreme Court of the United States would in any case appoint a receiver pending an appeal in that court is an undecided point; but upon a motion for a receiver of the Pacific Railroad in Missouri, the court declined to make the appointment upon the showing made in that case.[2] Appeals in equity are heard upon the pleadings and proofs below. No new evidence can be admitted, and the pleadings cannot be amended. A decree of foreclosure and sale had been entered in the Circuit Court by consent of the company. The solicitor of the company bought the property at the sale, paying the purchase principally in bonds of the company, secured by the foreclosed mortgage. The owners of the bonds thus paid over organized themselves into a new company, and the property was assigned to them.

[1] Vose *v.* Reed, *supra*.

[2] Pacific R. R. of Missouri *v.* Ketchum, 95 U. S. 1; Pacific Railroad *v.* Missouri Pacific R. R. Co. 15 Am. Railw. R. 80.

The receiver who had been appointed in the Circuit Court pending the proceedings was discharged, and was directed to turn over all the property in his hands to the new corporation. Soon after this the new company made a new mortgage for a greater sum than that which had been cancelled by foreclosure, and delivered the bonds principally to the parties who had been holders of the bonds surrendered in payment of the purchase money. The stockholders of the old company, at a meeting soon after this, repudiated the action of their directors in allowing a foreclosure decree to be taken; and an appeal was accordingly taken from the decree of foreclosure. The Supreme Court refused to grant the relief asked, because the pleadings did not disclose the defence sought to be made. Although the sale was in form to the company's solicitor, it was in reality to the bondholders for whom the foreclosure was had; and it appeared affirmatively that the original decree was by consent, and no irregularity in the sale was complained of in the court below.

473. The appointment of a receiver in such case may, perhaps, be more appropriately made by the Circuit Court from which the litigation was taken to the Supreme Court. It might be inconvenient, if not impracticable, for the Supreme Court to pass such interlocutory orders as would be necessary to protect the property in litigation. The Circuit Court could, however, act with a full knowledge of the facts, and of the practice in such cases. That court, moreover, has the ultimate disposition of the property under the direction of the Supreme Court. Such a course was pursued by the Circuit Court sitting in Georgia in a suit by Henry Clews against The Cherokee Railroad Company. While the case was pending before the Supreme Court of the United States, occasion arose for the appointment of a receiver to prevent the waste and destruction of the property. The appointment was made by the Circuit Court. The Supreme Court of Georgia, upon a question whether a receiver appointed in a court of that state should be sustained as against the receiver appointed by the Circuit Court, was of opinion that the latter court had properly made the appointment.[1]

474. The general rule to be deduced from the many cases

[1] May *v.* Printup, Supreme Court of Georgia, August T. 1877, 5 Reporter, 392.

showing what facts and circumstances justify the appointment of a receiver in behalf of a mortgagee is, that the appointment will be made when the security is inadequate, or there has been waste or misapplication of the property by the mortgagor or other party in possession; and also when there is danger of such abuse on the mortgagor's part, and of consequent loss to the mortgagee.[1] Inadequacy of security is always an essential ingredient of a case that calls for such interference, unless it be shown that there is imminent danger of the sacrifice or loss of an adequate security.

There is a well defined distinction as to the right to have a receiver appointed between a mortgage which pledges the tolls and income of the property, and one which does not. When there is such a pledge of the rents and profits, upon a default and petition of the great body of the bondholders or of trustees representing them, a receiver is appointed very much as of course.[2] It has been suggested that, in such case, instead of the court's assuming the management of the road, it may sometimes be expedient to require the earnings of the road to be paid over to a receiver, to be held and distributed by him, — the interference of others with the management of the road being prevented meanwhile by injunction.[3]

475. As a general rule, a receiver appointed in a prior suit should not be displaced by the appointment in a subsequent suit of a receiver of the same subject matter by the same court. The receiver does not represent the plaintiff in the suit, but the court. Unless there be special occasion for displacing the receiver first appointed, the proper course of practice is to extend the receivership in the first suit over the second, subject to the legal and equitable claims of all parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times, when such receivership was granted. If, however, a different receiver be appointed in the second suit, the receiver in the first suit is displaced and must deliver the property to the receiver appointed in the second.[4]

[1] Keep *v.* Mich. Lake Shore R. R. Co. 6 Chicago Legal News, 101.

[2] Des Moines Gas Co. *v.* West, 44 Iowa, 23, 25.

[3] Per Manning, J., in Meyer *v.* Johnston, 53 Ala. 237, 350.

[4] Florida *v.* Jacksonville, Pensacola & Mobile R. R. Co. 15 Fla. 201, 276.

476. As a general rule a receiver should not be appointed without notice to the mortgagor or other party in possession and an opportunity to be heard. It would be a case of great urgency, and where delay would involve a serious injury to the property in controversy, that would justify an exception to this rule. During the interval between the application for the appointment of a receiver and the hearing after notice, sufficient protection of the plaintiff's rights can usually be afforded by an injunction or other restraining order.[1]

Upon an application for a receiver, the mortgagee is not required to establish conclusively his right to recover, but merely to show a probable right, especially when he is entitled by the terms of the mortgage to the income, rents, and profits of the mortgaged property.[2]

477. When an individual bondholder or a judgment creditor seeks the appointment of a receiver he must sue on behalf of himself and all other persons who have interests of the same kind or class as his own. In such a proceeding, he acts as trustee for all others who are entitled to be paid *pari passu* with him.[3] It is not necessary that the other parties in interest should concur in the application.[4]

478. If the mortgaged premises are in the possession of a tenant or lessee, it is necessary to make him a party to the suit before a receiver of the property can be appointed. If he be not made a party, there is no objection to the appointment of a receiver of the rents and profits to whom the tenant could be required to attorn; but such receiver would have no power to molest the possession of the tenant.[5]

[1] Florida *v.* Jacksonville, Pensacola & Mobile R. R. Co. 15 Fla. 201; and see Cincinnati, Sandusky & Cleveland R. R. Co. *v.* Sloan, 31 Ohio St. 1; *S. C.* 15 Am. Railw. R. 376; High on Receivers, §§ 111, 112. In Louisiana the appointment of a receiver of a corporation on an *ex parte* application without alleging its insolvency is held to be absolutely null. Turgeau *v.* Brady, 24 La. Ann. 348.

[2] Des Moines Gas Co. *v.* West, 44 Iowa, 23.

[3] Bowen *v.* Brecon Ry. Co. L. R. 3 Eq. 541; Potts *v.* Warwick & Birmingham Canal Co. Kay, 142; Fripp *v.* Chard Ry. Co. 11 Hare, 241; Gravenstine's Appeal, 49 Pa. St. 310.

[4] Fripp *v.* Chard Ry. Co. *supra.*

[5] Keep *v.* Michigan Lake Shore R. R. Co. 6 Chicago Legal News, 101; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565.

479. The fact that a corporation is insolvent will not authorize the corporation itself to apply to a court of equity for a receiver to wind up its affairs. A creditor in a proper case may come into court with such application, but the insolvent debtor cannot.[1] A corporation cannot apply in its corporate capacity and name to be put into the custody of a receiver.[2]

II. *Selection of Receivers.*

480. In the appointment the court is not necessarily controlled by the expressed wish of the parties, although the mortgagee and mortgagor both concur in asking for the appointment of the same person. If such person be one under whose charge the resources of the road have been exhausted and the necessity for a receiver brought about, the court will probably refuse to make the appointment. The receiver is not the servant of the bondholders, but of the court, which must regard the interests of other creditors of the insolvent corporation.[3] The court should, at any rate, be satisfied of the fidelity and ability of the person to whom the property is intrusted during the pendency of the suit; and although it is often proper and desirable that officers of the corporation to whom no fault is imputed should be continued in the management of it as receivers,[4] when there has been mismanagement, the control of the road should not be given to those whose administration of its affairs had ended in bankruptcy.[5] It has been declared, moreover, that an officer of a corporation under whose management it has become insolvent is not a proper person to be appointed a receiver. A person who cannot, with the aid of others, manage a business successfully, is as a general rule regarded as unfit to wind it up alone.[6]

Where a receiver has been put in possession of a road, under an agreement between the parties in interest in a foreclosure suit that the complainants, upon giving security in the sum of $350,000, should have possession of the road and should name the receiver, the other parties are placed in a somewhat different attitude towards that officer from what they would be in if he were

[1] Hugh *v.* McRae, Chase's Dec. 466.

[2] Kimball *v.* Goodburn, 32 Mich. 10.

[3] Richards *v.* Chesapeake & Ohio R. R. Co. 1 Hughes, 28.

[4] Meyer *v.* Johnston, 53 Ala. 237.

[5] Williamson *v.* New Albany, &c. R. R. Co. 1 Biss. 198.

[6] McCullough *v.* Merchants' Loan & Trust Co. 29 N. J. Eq. 217; Freeholders of Middlesex County *v.* State Bank of New Brunswick, 28 N. J. Eq. 166.

appointed by the court in the ordinary way; for it does not lie with them to object to the *person* of the receiver, though he be a complainant in the suit, unless he commits some overt act of unfaithfulness to his trust, which can be specified and proved. They cannot go into his previous transactions in the suit, in order to show that he had heretofore done acts which exposed him to personal animadversion.[1]

481. **It is not unusual for parties representing different interests to agree upon the appointment of two or more receivers,** each of whom is expected to represent and look after the interests of one of the parties; and the courts have usually appointed the receivers so agreed upon. So long as harmony prevails between receivers so appointed, there may be no difficulty experienced in operating the road under such management, excepting the additional expense of two or more receivers where only one is required. But it must be observed that this practice is of doubtful utility. Dissensions are apt to arise between the representatives of discordant or hostile interests, and then the practicable management of the road by them becomes impossible. In a case where this had been the result of appointing such receivers,[2] Mr. Justice Miller, in removing them to make way for one receiver who should represent the court and be strictly neutral in both feeling and conduct, said, "I have only one word to add: In every view a receiver is strictly and solely the officer of the court, if, by reason of the inability or neglect of the officers of the corporation to conduct its business as it ought to be done, the conduct of that business is taken charge of by the court, and carried on by its agent. It is the duty of that agent to so conduct this business as that the lawful rights and legal interest of all persons shall be protected as far as possible with equal and exact justice. This is much more likely to be done by a receiver who has no interest in the capital stock of the road; none in its debts, and no obligations to those who have; such a person, acting under the control of the court, seeking its advice, as he would be inclined to do, on all questions of doubtful duty, and bound in sufficient surety for the faithful performance of his duty, is, in my opinion, the proper one for such an office."

[1] Cowdrey *v.* Railroad Co. 1 Woods, 331. Circuit Court Dist. of Kansas, 12 Chicago

[2] Meier *v.* Kansas Pacific Ry. Co. U. S. Legal News, 41, for Oct. 26, 1878.

Generally it may be said that the existence of two receivers representing opposing interests is unnecessary and embarrassing, even if they are on amicable terms, and have but a single place of business. But their different interests are almost certain to render them antagonistic, and in that event a successful operation of the road is rendered impossible. As remarked by Mr. Justice Miller in the case under consideration, while it may be true that a large personal interest may stimulate the activity and direct the vigilance; whenever occasion offers that vigilance will be directed mostly to advancing personal interests, and that activity to securing personal advantages.

482. The appointment of a receiver once made cannot be assailed in a collateral proceeding where it appears that the court has jurisdiction of both the subject matter and of the necessary parties. However erroneous the order of appointment may have been it cannot be treated as void, but at the most only as voidable in a direct proceeding for that purpose.[1] The same observations apply equally to an order granting an injunction against the prosecution of a suit or judgment against a receiver.[2]

Where the fact of the appointment of a receiver is put in issue by the pleadings, a copy duly authenticated of the order appointing him is admissible evidence of the appointment.[3]

III. *Jurisdiction of Receivers.*

483. Whether a receiver's authority is limited to the jurisdiction of the court appointing him. — The authority of a receiver cannot ordinarily extend beyond the limits of the territory within which the court making the appointment has jurisdiction, whether this be a state, county, or other local district. If the court making the appointment has jurisdiction throughout a state, the receiver has authority to take possession of property embraced in the receivership anywhere in the state, but he has no authority beyond that state, except so far as he is allowed to act in other states through the comity of other governments. A receiver appointed by a court having jurisdiction of a limited judicial district within a state has no authority to take possession of property in another judicial district.[4] The inability of a receiver to exercise

[1] Richards *v.* People, 81 Ill. 551.

[2] Richards *v.* People, *supra*.

[3] Allen *v.* Cent. R. R. Co. 42 Iowa, 683.

[4] Florida *v.* Jacksonville, Pensacola & Mobile R. R. Co. 15 Fla. 201.

any extra-territorial power has been asserted by some courts with great positiveness;[1] and sometimes courts seem to have unqualifiedly refused to recognize a foreign receiver, and allow him to maintain actions, on any ground whatever.[2] On the other hand, the fullest authority has been accorded to foreign receivers to bring suits with reference to the property they were appointed to take charge of.[3] When the title of the receiver is not merely one derived from his appointment as such by a foreign court, but he has himself acquired a title personal to himself by reducing the property to possession,[4] or by an assignment of the property from the debtor,[5] his right to pursue the property in a foreign jurisdiction may be regarded as certain. He has in such case a right of action in his individual capacity.

The generally recognized doctrine, however, is that a receiver appointed in one state has no power to institute proceedings in the courts of another state, except by comity and inter-state and inter-national courtesy; but upon this principle a receiver is generally allowed to sue in foreign courts unless the claim he is seeking to enforce comes in conflict with creditors in that state, claiming under attachment or other lien.[6] As against a foreign corporation and a receiver appointed in another state, courts sometimes protect creditors in their own states by sustaining attachments of property actually within the state where suit is brought; and if in such case a receiver be subsequently appointed in that state, he takes the property subject to any lien that may have been acquired by the attaching creditor.[7]

484. It is a rule of law in all cases of conflict of jurisdiction that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation,

[1] Booth *v.* Clark, 17 How. 322.

[2] Farmers' & Merchants' Insurance Co. *v.* Needles, 52 Mo. 17.

[3] Paradise *v.* Farmers' & Merchants' Bank of Memphis, 5 La. Ann. 710; McAlpin *v.* Jones, 10 La. Ann. 552.

[4] Cagill *v.* Woolbridge (Tenn.), 4 Cent. L. J. 6.

[5] Graydon *v.* Church, 7 Mich. 36, 51.

[6] Hoyt *v.* Thompson, 5 N. Y. 320; Willitts *v.* Waite, 25 N. Y. 577; Graydon *v.* Church, 7 Mich. 36; Taylor *v.* Columbian Ins. Co. 14 Allen (Mass.), 353; Hunt *v.* Columbian Ins. Co. 55 Me. 290, 298; Cagill *v.* Woolbridge (Tenn.), 4 C. L. J. 6.

[7] Dunlop *v.* Paterson Fire Ins. Co. 12 Hun (N. Y.), 627; Taylor *v.* Columbian Ins. Co. 14 Allen (Mass.), 353. See Osgood *v.* Maguire, 61 N. Y. 524, respecting the *situs* of property in the form of promissory notes in the hands of a receiver. The case is in conflict with the Massachusetts case on this point.

and incidentally to take possession of the subject matter of the dispute through a receiver, to the exclusion of all interference from other courts of coördinate jurisdiction. As remarked by Judge Blodgett, in a case before the Circuit Court of the United States for Northern Illinois,[1] "The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property; and while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained." Thus, if after the filing of a bill against a railroad company in the Circuit Court of the United States in which the appointment of a receiver is asked for, and before such appointment is made a suit be commenced in a state court for the appointment of a receiver of the same property, the state court, although it may take possession of the property through its receiver, cannot supersede the jurisdiction of the Circuit Court; but the latter court will proceed in due course to appoint a receiver, if occasion for such action be shown, and will assert its jurisdiction. The adding of a new party and raising a new question as to him is not enough to give jurisdiction to another court.[2]

485. Where the conflict of jurisdiction does not relate to the cause, but to the possession of the subject matter, priority of possession may be the test of the right to retain possession.[3] The question whether an actual seizure of the property is necessary to the jurisdiction of the court in a case where the possession

[1] Union Trust Co. *v.* Rockford, Rock Island & St. Louis R. R. Co. 6 Biss. 197; Alabama & Chattanooga R. R. Co. *v.* Jones, U. S. C. C. 7 N. B. Reg. 145; Bill *v.* New Albany, &c. Ry. Co. 2 Biss. 390; Keep *v.* Mich. Lake Shore R. R. Co. 6 Chicago L. N. 101; Sedgwick *v.* Mench, 6 Blatchf. 156.

[2] Memphis City *v.* Dean, 8 Wall. 64.

[3] Mallett *v.* Dexter, 1 Curtis, 178; Wiswall *v.* Sampson, 14 How. 52; Chittenden *v.* Brewster, 2 Wall. 191; Buck *v.* Colbath, 3 Wall. 334; Memphis City *v.* Dean, 8 Wall. 64; Watson *v.* Jones, 13 Wall. 679; Bill *v.* New Albany, &c. Ry. Co. 2 Biss. 390; Parsons *v.* Lyman, 5 Blatchf. 170.

of the property is necessary to the relief sought, or whether the commencement of the action and service of process, or the commencement of the action by the filing of the bill, is sufficient to give the court jurisdiction, to the exclusion of all other courts, was discussed in the case of *Wilmer* v. *Atlanta and Richmond Air Line Railway Company*,[1] in the Circuit Court of the United States for the Northern District of Georgia. The bill in that case was filed the thirtieth day of October, 1874, for a foreclosure of a mortgage, and a copy and notice of motion for injunction and receiver were served on the railroad company the next day. On the ninth of November following the company was enjoined from yielding possession of the property to any one except a receiver appointed by the court in this case. A creditor of the company having recovered judgment levied his execution upon the road, and sold it in different parcels, and the purchaser was put in possession by the sheriff on the same ninth day of November. On the next day the company, by its managing director, filed a bill in the Superior Court of Fulton County, in the State of Georgia, to prevent the judgment creditor and the purchaser from taking possession of the road. On November twentieth, the purchaser filed a cross-bill in the same court, asking for the appointment of a receiver; and a receiver was the next day appointed, who, on the twenty-sixth of the same month, took possession. The Circuit Court, on the nineteenth of December following, appointed a receiver of the entire property covered by the mortgage, but the receiver was unable to get possession of that part of the trust property lying in Georgia, and on the twenty-fourth of May, 1875, he applied to the court for a writ of assistance to enable him to get possession of the property in Georgia. Judge Woods, in appointing the receiver of the Circuit Court, was of opinion that the filing of the bill in that court and the service of process excluded the jurisdiction of all other courts to take possession of and administer the property or any part of it. But Mr. Justice Bradley, before whom the application for the writ of assistance was heard, differed from Judge Woods as to the jurisdiction and powers of the court, saying: "It is too well settled to admit of controversy that where two courts have concurrent jurisdiction of a subject of controversy, the court which first assumes jurisdiction has it exclusive of the other. But where the objects of the suits are different this rule does not apply, although

[1] 2 Woods, 409.

the thing about or in reference to which the litigation is had is the same in both cases. Thus, an action of debt on a bond, an action of ejectment on the mortgage given to secure it, and a bill in equity to foreclose the equity of redemption, may be pending at the same time, unless prohibited by some statutory regulation. The land mortgaged may be seized in execution by the sheriff in an action at law, even while the ejectment or the bill to foreclose is pending. A bill to foreclose is a personal proceeding, although it has reference to a specific thing. Its object is to put an end to an existing equity, and to procure a sale of the mortgaged premises. Possession may be taken in the course of the proceeding, but until it is taken, can it be said that the property is sacred from the touch of other persons or courts? . . . . The controversy not being the same, nor the parties the same, there is no conflict of jurisdiction as to the question or cause. But, inasmuch as both controversies have ultimate respect to the possession of the railroad of the Atlanta and Richmond Air Line Railway Company, there has arisen a conflict of jurisdiction as to the thing or subject matter. It is important to know, therefore, whether this court had jurisdiction over the subject matter, namely, the railroad, when taken possession of by the receiver of the Fulton County Court, so as to make that taking an invasion of the jurisdiction and powers of this court. If it had, it will enforce that jurisdiction, and assume the actual possession to which it gives the right. If it had not, then it will not interfere with the actual possession of the receiver of that court, though the rights represented by the litigants in this court be superior to those of both litigants in the state court, as those rights can be asserted when the possession of the state court has ceased. The reason that it will not interfere in such case is, that interference might create a collision between the two courts, which would be unseemly, and contrary to the comity which should exist between them. The two courts are coördinate in jurisdiction, neither being superior to the other, and both being charged in the respective cases before them with the due administration of the laws of the State of Georgia.

"The test, I think, is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton County Court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this

court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or, having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close, and judicial possession has ceased. Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction. The alleged collusion and fraud of the parties cannot alter the case. It is a question between the two courts; and we must respect the possession and jurisdiction of the sister court. We cannot take the property out of its hands, unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied." [1]

486. Doctrine that the mere filing of the bill gives jurisdiction of the thing in controversy. — The Supreme Court of Georgia, recognizing a difference of opinion upon the question whether the mere filing of a bill, in a case where the only recovery can be out of the property, gives such jurisdiction of the *res* as to prevent another court from appointing a receiver, expressed the opinion that it does.[2] The decision of the case, however, was made in view of facts showing a case of collusion in the appointment of a receiver in a court of the state. In a suit against the Cherokee Railroad Company, begun in the Circuit Court in 1872, a receiver was appointed, but afterwards, by consent, this appointment was revoked; but the case otherwise remained the same, and after a decree in favor of the plaintiff, the case was carried to the Supreme Court of the United States. While it was there pending, in September, 1876, certain parties, some of whom were parties defendant in the former suit, filed a bill in a court of the state, praying, among other things, for the appointment of a receiver. On October second the chancellor passed an order for a hearing on the twenty-third day of the same month, and for perfecting service ten days before that time. Afterwards, by consent, the hearing was set for the tenth day of the month, when

[1] *Quære* as to correctness of this opinion.

[2] May *v.* Printup, August T. 1877, 5 Reporter, 392. The court refer to the opinion of Mr. Justice Bradley, 2 Woods, 409, stated in the preceding section, to the contrary, and dissent from it on this point.

a receiver was appointed. Meanwhile, pending the former case in the Supreme Court, the appointment of a receiver was applied for in the Circuit Court, and a hearing was had and a receiver was appointed on the twentieth of October. This receiver found the receiver appointed by the state court in possession; whereupon, under the direction of the Circuit Court, he applied to the state court for the possession of the property. The chancellor granted an order to that effect, which was affirmed by the Supreme Court of the state, upon the ground that the chancellor made the appointment inadvertently, and without knowledge of the facts of the proceedings in the federal court, and under circumstances indicating a collusion of parties in obtaining the appointment.

487. When a receiver has once obtained actual possession of the property committed to his charge, he cannot be interfered with by a receiver subsequently appointed in another court.[1] When a question is pending in one court of competent jurisdiction, it cannot be raised and agitated in another court; much less can a court assume to take possession of and administer property which is in possession of another court, and in course of administration by it.[2] Upon the institution of proceedings in bankruptcy in a United States court against an insolvent railroad company, already in the hands of a receiver appointed under proceedings in a state court, his possession will not be interfered with, except for some cause for which his title might be impeached under the Bankrupt Act.[3] A court of the United States will not entertain a bill for an account against the receiver of a corporation appointed by a state court, but will leave the petitioner to pursue his remedy in the court from which the receiver derived his appointment.[4] Neither will the court appoint a receiver of property which is in the possession of a person not a party to the suit. Such person may be made a party, and the objection is then removed.[5]

[1] O'Mahoney *v.* Belmont, 37 N. Y. Superior Ct. 380; Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 409.

[2] Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606.

[3] Alden *v.* Boston, Hartford & Erie R. R. Co. 5 N. B. R. 230.

[4] Conklin *v.* Butler, 4 Biss. 22.

[5] Searles *v.* Jacksonville, Pensacola & Mobile R. R. Co. 2 Woods, 621; Florida *v.* Jacksonville, Pensacola & Mobile R. R. Co. 15 Fla. 201, 280.

488. When, however, a line of railway extending through several states belongs to the same corporate body which the several states, by concurrent legislation, have united in creating, a court having jurisdiction of the corporation has jurisdiction of its property, both within the state and beyond its limits, and may appoint a receiver of the whole. The Atlanta and Richmond Air Line Railway Company, extending from Atlanta, in Georgia, through South Carolina, to Charlotte, in North Carolina, having mortgaged its entire road and property, and made default in the payment of interest, executions were issued against the company, and a receiver was appointed in each of the three states, although the same person was appointed in the States of North and South Carolina. There were, therefore, three distinct and independent courts claiming possession of different portions of the road and other property of the company, and it was in the actual possession of two different receivers, living in different states and accountable to different tribunals. In this position of the affairs of the company the bondholders secured by the mortgage applied to the Circuit Court of the United States for the Northern District of Georgia to appoint a receiver for the entire line of the road.[1] The bill averred that this railroad property was one inseparable and indivisible piece of property; that it was a portion of a great through route, and derived its chief value and business from that fact. "It is obvious," said the Circuit Court judge, Mr. Woods, in appointing the receiver, "that it would be a most unfortunate case that such a property should be held by two different receivers, accountable to three different courts. In fact, when we consider that a large part of the property of the company consists of rolling stock, which must necessarily pass from one end of the road to the other, and which must be used on the three divisions into which the road is divided by its administration in three different courts, it appears to be well-nigh impossible to administer the affairs of the road and render accurate and satisfactory accounts. It is evident that such a divided control must result in crippling the operations of the road, destroying its business and reducing its receipts, and placing in jeopardy the security of its creditors. This unfortunate condition of affairs, resulting from the action of three independent courts, would of itself be, as it appears to us, sufficient ground for the appointment of a receiver for the entire property

[1] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 409.

by this court, if the power and jurisdiction of this court to do so is clear."

The property of the company in such case is one entire and indivisible thing. If the receiver is compelled to ask the assistance of courts of other jurisdictions to aid him in obtaining possession of the property, those courts would feel constrained, as a matter of comity, to afford all necessary aid to put him in possession.[1] If the suits are commenced in courts of coördinate jurisdiction, and receivers are appointed by both, it would seem that the court which first seizes the property acquires jurisdiction over it, to the exclusion of the other, without reference to the time when the suits were commenced.[2]

489. **Two or more states may, by concurrent legislation, unite in creating the same corporate body**, so that instead of two or more separate bodies in the different states, there is one consolidated body having the same rights and functions in the one state that it has in the other.[3] A court having jurisdiction over a corporate body of this kind, such for instance as a consolidated line of railroad, may exercise jurisdiction over its real and personal property outside of the limits of the state to which the jurisdiction of the court is ordinarily limited, by the appointment of a receiver to take possession of the entire property, both within and without the state. The court having jurisdiction of the corporation may, through that, reach its property situated outside the territorial jurisdiction of the court. If necessary, it might require assignments to be made by the company to the receiver.[4] If other persons outside the territorial jurisdiction of the court have seized the property of the company, so that the court cannot reach it by controlling the company, the receiver may be compelled to ask the assistance of the courts of that jurisdiction to aid him in obtaining possession; but the courts of other jurisdictions would feel constrained, as a matter of comity, to afford all necessary aid in their power to put such receiver in possession.[5]

[1] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 409; and see Ellis *v.* Boston, Hartford & Erie R. R. Co. 107 Mass. 1.

[2] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. *supra.*

[3] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. *supra;* and see Ellis *v.* Boston, Hartford & Erie R. R. Co. 107 Mass. 1.

[4] Northern Indiana R. R. Co. *v.* Michigan Cent. R. R. Co. 15 How. 233, 243.

[5] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 409.

490. A receiver appointed by a court having jurisdiction of the cause cannot be interfered with by a court of coördinate jurisdiction under proceedings subsequently commenced.[1] When a junior mortgagee has first brought a suit to foreclose his mortgage, and the court has taken possession of the mortgaged property by a receiver, a senior mortgagee cannot gain possession of the property while that suit is pending by a suit subsequently begun in another court. He can only interfere with such possession by being admitted as a party to the first suit. The senior mortgagee may commence a suit to foreclose his mortgage in another court having jurisdiction, but no matter what he may be able to show as to the incompetency, unfitness, or dishonesty of the receiver appointed in the prior suit by the junior mortgagee in another court, he can neither obtain the removal of that receiver or the appointment of another except by going into that court and presenting his complaints there.

491. By the comity existing between the courts of the different states, although a receiver has no extra-territorial jurisdiction, his appointment and title are recognized in other states when his claims do not come in conflict with those of citizens of the state in which adverse proceedings arise. Thus, a receiver having been appointed in Virginia in a foreclosure suit against the Atlantic, Mississippi, and Ohio Railroad Company, a citizen of that state soon afterwards attached by trustee process, in a court of the State of Pennsylvania, certain funds and credits of that company in the hands of the Pennsylvania Railroad Company. The receiver claimed the funds, and his right to them was sustained; the court declaring that a creditor had no right, after the appointment of a receiver by a court within his own state, binding upon him there, to attempt to avoid its effect by escaping from its jurisdiction, and going into another state and asking the courts there to infringe the comity due to the acts of the courts of his own state. Instead of comity this would be unfriendliness, for it would be asking the courts of a foreign state to aid in the violation of the law of the plaintiff's own state.[2]

A citizen of the State of Massachusetts, appointed a receiver

[1] Young *v.* Montgomery & Eufaula R. R. Co. 2 Woods, 606.

[2] Bagsby *v.* Atlantic, Miss. & Ohio R. R. Co. in Supreme Court of Pa. Feb. 1878; 5 Weekly Notes, 263; 5 Reporter, 661.

of an Ohio corporation by the United States Circuit Court in the latter state, may maintain an action in that court for the recovery of assets of such corporation wrongfully withheld.[1] A receiver may generally sue in the courts of another state. His power to do so, however, arises from comity merely, unless there be a special statute authorizing such a suit; and is generally kept subordinate to the rights of local creditors, as respects property within the jurisdiction where such a suit is brought.[2]

492. **When property has once vested in a receiver he can take it into another state,** and the law of such other state will not divest him of his right to it. If it be attached in such other state as the property of the corporation of whose property the receiver has been put in charge, the courts will inquire whether he has such right to the property when it comes into the state as between himself and the citizens of the state; but when the fact that he has such right is ascertained, they will not regard it as important by what mode the right was acquired. It makes no difference whether the property vested in the receiver under the local law of another state or under the common law. Neither is it a matter of any importance whether the title to the property in such case passes to the receiver or remains technically with the corporation, so long as the property is taken from the corporation and placed in the hands of the receiver under the direction of the court.[3] If such property be already in the state when the receiver is appointed, and it be attached at the suit of a citizen before the receiver has taken possession of it, then the appointment of the receiver in a foreign state might not vest the property in him as against such creditor.[4]

In a proper case the courts will protect citizens of their own state against the claims of a receiver appointed by an extra-territorial court, because they are not bound by such appointment, and their assistance will not be given at the expense of injustice to citizens of their own state, to enforce an extra-territorial act resting only in comity.

[1] Farlow *v.* Lea, 6 C. L. J. 195.

[2] Chandler *v.* Siddle, 3 Dill. 477.

[3] Pond *v.* Cooke, Supreme Court of Conn. 6 Reporter, 516.

[4] Taylor *v.* Columbian Ins. Co. 14 Allen (Mass.), 353; Upton *v.* Hubbard, 28 Conn. 274; Willitts *v.* Waite, 25 N. Y. 577.

CHAPTER XVI.

THE RIGHTS AND LIABILITIES OF A RECEIVER.

I. The title and power of a receiver in general, 493–498.

II. A receiver cannot be sued without leave of the court appointing him, 499–508.

III. A receiver's liability to suit for the negligence of his employees, 509–515.

IV. The company itself is not liable after the receiver has assumed control, 516–520.

V. Discharge and removal of receiver, 521–526.

VI. Compensation and account of receiver, 527–530.

I. *The Title and Power of a Receiver in General.*

493. The title of a receiver to property placed in his charge relates back to the date of the order of his appointment. — The order of the court, either impliedly or expressly, takes the title from the defendant, and it is thenceforth under the control of the court; and whether he be immediately appointed and qualified to act or not, the title of the court and of its agent and officer dates from that moment.[1] The title to real estate vests in the receiver by conveyance from the debtor, which the court may compel him to make;[2] but he is entitled to the rents and profits from the date of the order appointing him, which in effect removes the defendant or other person from the possession unless he holds under a title paramount to that under which the appointment was made.[3]

The right to the custody of the property of which a receiver is appointed vests immediately in him upon the filing of his bond; and he may, if necessary, by order of court, bring a suit for it in his own name. But the right of possession extends only to the

[1] Steele *v.* Sturgis, 5 Abb. (N. Y.) Pr. 442; Rutter *v.* Fallis, 5 Sandf. (N. Y.) 610; Fairfield *v.* Weston, 2 Sim. & St. 96; Maynard *v.* Bond, Supreme Court of Mo. 6 Reporter, 530. And see Metz *v.* Buffalo, Corry & Pittsburg R. R. Co. 58 N. Y. 61; Allen *v.* Central R. R. Co. 42 Iowa, 683. *Contra*, see Farmers' Bank *v.* Beaston, 7 G. & J. (Md.) 421.

[2] Chautauqua Bank *v.* Risley, 19 N. Y. 369; Scott *v.* Elmore, 10 Hun (N. Y.), 68.

[3] Ames *v.* Birkenhead Docks, 20 Beav. 350; Evelyn *v.* Lewis, 3 Hare, 472; Lloyd *v.* Mason, 2 M. & C. 487.

property which is the subject matter of the mortgage. It does not extend to money in the hands of the mortgagor at the time the appointment is made, for although it be earnings of the road the mortgage does not attach to it.[1]

If, however, the order appointing a receiver be conditional on his giving security, it would seem that he is not constituted receiver till he gives security; and that till he gives such security or takes actual possession, it is not contempt of court to take chattels comprised in the security in execution.[2] If the receiver really takes possession before the goods are seized, then, although his appointment as receiver had not been completed, still, as possession is taken on behalf of the mortgagee, it would seem that it would be effectual against any interference by execution.[3]

494. A receiver takes the property subject to any legal or equitable liens upon it at the time of his appointment.[4] Thus money deposited by a railroad company with bankers for the payment of a dividend is regarded as specially appropriated for that purpose, and as giving the stockholders an equitable lien upon it to the extent they are respectively entitled to share in it; and a receiver appointed before the whole amount deposited has been paid out takes such funds subject to this equity. The Erie Railway Company having so deposited the amount of a dividend payable October first, 1873, a little more than a year afterwards withdrew a balance of about $5,000, which had not been paid out, and this sum passed into the hands of a receiver appointed soon afterwards. A stockholder who had been absent and had neglected to draw his dividend applied to the court by petition for an order directing the receiver to pay him the amount of his dividend, and such an order was made and was confirmed by the Supreme Court of New York at general term.[5]

The appointment of a receiver does not enlarge or restrict the powers conferred upon the corporation by its charter. The receiver takes the property subject to the same limitations that

[1] Noyes *v.* Rich, 52 Me. 115; Rider *v.* Vrooman, 12 Hun (N. Y.), 299.

[2] Edwards *v.* Edwards, L. R. 2 Ch. D. 291, overruling V. C. Malins, that the appointment takes effect from the date of the order; *S. C.* L. R. 1 Ch. D. 454.

[3] Edwards *v.* Edwards, *supra*, per Mellish, L. J.

[4] Bell *v.* Shibley, 33 Barb. (N. Y.) 610. As to rights of set-off see Berry *v.* Brett, 6 Bosw. (N. Y.) 627.

[5] Le Blanc *in re*, 4 Abb. New Cas. (N. Y.) 221.

affected it in the hands of the company. An injunction granted by a court of competent jurisdiction restraining a railroad company from obstructing certain streets is binding upon a receiver subsequently appointed by a court of the United States, in the same manner that it is binding upon an agent of the company or upon a subsequent purchaser.[1]

495. Suits by receivers. — A receiver represents the creditors of the corporation whose property and effects he is placed in charge of by a court of equity, so that in a suit brought by the receiver to protect the property of the company, the creditors are neither proper nor necessary parties.[2] While in bringing an action he should allege his appointment by a court of competent jurisdiction and his capacity to prosecute the action in his official capacity,[3] the regularity or propriety of his appointment cannot be called in question in such suit, but only in a direct proceeding for that purpose.[4]

In general, a receiver cannot sue without express authority from the court.[5] Even if the order of appointment in general terms confers the power to sue, it is usual and proper for a receiver before instituting a suit to obtain leave of court to do so.[6]

A receiver of a corporation has all the rights of action and the same legal remedies against third persons that the corporation itself had.[7] Suit should be in the name of the corporation, in whom the right of action was before his appointment.[8] If the defendant or other person in possession of the property refuses to deliver it to the receiver, before attempting to take possession he should obtain an express order of court directing him to do so. If a third person holds the property under a claim of right, the receiver may obtain leave to bring an action to try such right, or the plaintiff in the suit in which the receiver is appointed may make such third person a party to the suit, and apply to have the receivership extended over the property in dispute.[9]

[1] Safford *v.* People, 85 Ill. 558.

[2] Gray *v.* Davis, 1 Woods, 420. See McNab *v.* Noonan, 28 Wis. 434.

[3] Curtis *v.* McIlhenny, 5 Jones (N. C.), Eq. 290.

[4] Vermont & Canada R. R. Co. *v.* Vermont Cent. R. R. Co. 46 Vt. 792; Palmer *v.* Clark, 4 Abb. N. C. (N. Y.) 25; Case *v.* Marchand, 23 La. Ann. 60.

[5] Screven *v.* Clark, 48 Ga. 41.

[6] High on Receivers, § 208; Hayes *v.* Brotzman, 6 Reporter, 493.

[7] High on Receivers, § 316.

[8] Booth *v.* Clark, 17 How. 331; Yeager *v.* Wallace, 44 Pa. St. 294; Manlove *v.* Burger, 38 Ind. 211.

[9] Parker *v.* Browning, 8 Paige (N. Y.), 388.

496. The relation of the receiver to leases of the property. Whether a receiver can refuse to operate a road leased to the corporation whose property has been put under his control is a question important for him to consider when the leased road can be operated only at loss. If the mortgages under which he has been put in possession of the road are older than the lease, the mortgagees would not be bound by it unless they have assented to it, and it would seem that a receiver in such case might disregard the lease. But where on an application by motion to compel a receiver to comply with the terms of a lease to the corporation in his charge, he set up his appointment and denied that he was then operating the road or had operated it under the lease, the court will not on such motion try and settle a disputed question of law and fact. The rights of the parties should be settled in an action. The mortgage bondholders, whose moneys it is sought to divert to the payment of the rent of the leased road, or their trustees, should be made parties to such a suit.[1]

A lease invalid in the beginning may be afterwards ratified by the corporation by the payment of rent or otherwise. If, however, it was one which the company had no power to make, it cannot then be ratified.[2]

A receiver of the Southern Minnesota Railroad Company appointed in a foreclosure suit was authorized to enter into a contract with a bridge company for the payment of fixed tolls for the use of the bridge for a series of years, binding the company, its assigns or successors, or the purchasers at the foreclosure sale under the deed of trust.[3]

Without authority conferred by statute or order of court a receiver has no power to make leases other than parol.

A receiver of a railroad under the appointment of the governor of a state has no power to lease the road so as to vest the lessee with an interest in the road and its franchises which could not be divested by a subsequent act of the legislature.[4]

Such is the authority of a Court of Equity over corporations in the charge of receivers, that as between two railroad companies

[1] People *v.* Erie Ry. Co. 54 How. (N. Y.) Pr. 59.

[2] Ogdensburgh & Lake Champlain R. R. Co. *v.* Vermont & Canada R. R. Co. 4 Hun (N. Y.), 268.

[3] La Crosse Railroad Bridge *in re*, 2 Dill. 465.

[4] McMinnville & Manchester R. R. *v.* Huggins, 59 Tenn. 177.

in the hands of receivers, upon the application of either receiver, a contract between the companies for the use of part of one road by the other company, and for the use of terminal facilities, may be modified so as to equitably readjust the rates agreed upon between them. If the application shows that at the time when the contract was made rents, tolls, equipments, and all kinds of labor and material were much more expensive than at present, and that the rate established by the contract is excessive and unjust, the court is not bound to recognize the obligation of the contract, but may modify it if it can be done with due regard to the interest of the other trust. "It will not require the receiver of one railroad company to furnish facilities to the receiver of another in the operation of the road in charge of the latter, to the detriment of the trust in the hands of the former; but, if there be necessity for so doing, it will not hesitate to modify the terms on which the facilities are furnished, wholly ignoring, if need be, the bargain made between the two insolvent companies, always taking care, however, that the company furnishing the facilities receives due compensation therefor."[1]

497. Whether a receiver may disregard a statute fixing traffic rates. — While the constitutionality of a state statute regulating freight and passenger tariffs was pending before the Supreme Court of the United States, Judge Dillon, in the Circuit Court, declined to order the receiver to disregard the law, or to conform to it in all things.[2] While there is always a presumption in favor of the validity of an act of the legislature, and that the receiver would be justified in following the state statute in all instances where the rates fixed by it are reasonable and fairly compensatory to the company, yet, the judge said that the receiver might exercise a fair and impartial judgment in the matter, and if he should be of opinion that the rates fixed by the statute are unjust and unreasonable, he was at liberty to act for the time being under the direction and advice of the mortgage trustees, who are the persons having the most at stake in the matter. No harm would come from this course, as the funds would be in the control of the court; and if it should turn out

[1] New Jersey & N. Y. R. Co. *in re*, 29 N. J Eq. 67. See, also, Delaware, Lackawanna & Western R. R. Co. *v.* Erie Ry. Co. 21 N. J. Eq. 298.

[2] McElrath *in re*, 2 Dill. 460.

that they had been improperly received, they would be restored to the parties who had overpaid.

498. What payments are within the discretion of a receiver. — It is a well recognized principle that a receiver should not, without the previous direction of the court, incur any expenses, on account of the property in his hands, beyond what is absolutely essential to its preservation and use.[1] In all matters involving a large outlay of money, the receiver should apply to the court in advance, for authority to make the proposed expenditure; but, except in extraordinary cases, the submission by the receiver, at frequent intervals, of his accounts to the master, giving the latter an opportunity to disallow whatever he may not approve, is regarded as a sufficient reference to the court for its ratification of the receiver's proceedings.[2] All outlays of a receiver of a railroad made in good faith, in the ordinary course of the management and operation of it, or so made with a view to advance and promote the business of the road, and make it profitable and successful, are fairly within the limit of discretion necessarily allowed him. Thus, payments made by him as rebatement of freight to shippers, in order to secure their custom and increase the business of the road, being in the nature of drawbacks, such as are usual with transportation companies, are properly within his discretion.[3]

The earnings of a railway company in the hands of a receiver are chargeable with valid claims for goods lost in transportation, and for damage done to them, while the road is under the management of the receiver. Such losses are incident to the working of the road, and may be regarded as part of the ordinary expenses of working it. The bondholders are entitled only to what remains of the earnings of the road after charges of this kind and other expenses of management are paid.[4]

In accordance with this rule a receiver is not allowed to charge in his account for expenditures made by him to defeat a proposed subsidy from a city to aid in the construction of a parallel line of railway, or to defeat any contemplated aid for such an en-

[1] Cowdrey *v.* Galveston, Houston & Henderson R. R. Co. 93 U. S. 352; *S. C.* 9 Am. Ry. Reg. 361.

[2] Cowdrey *v.* Railroad Co. 1 Woods, 331; Coe *v.* New Jersey, &c. R. R. Co. 27 N. J. Eq. 37.

[3] Cowdrey *v.* Railroad Co. 1 Woods, 331.

[4] Cowdrey *v.* Galveston, Houston & Henderson R. R. Co. 93 U. S. 352.

terprise. Although the proposed line of road might diminish the future earnings of the road in his charge, he is not allowed to determine for himself the question of the advisability of the expenditure, or to appropriate funds in his charge to defeat the measure.[1]

II. *A Receiver cannot be sued without leave of the Court appointing him.*

499. In general. — A receiver appointed by a Court of Equity to take charge of and manage property while litigation is pending touching such property is but the hand of the court to hold possession of and manage the property under the direction of the court, and is not supposed to act in the interest of one party more than another. He holds and manages the property for the benefit of the party to whom the court may adjudge it; and acting in this fiduciary capacity only, he is not subject to suit by any party who may have complaint against him, without leave first obtained from the court appointing him.[2] While property is in the possession of a court of the United States through its receiver, all proceedings in a state court affecting it without authority of the federal court are void. This statement applies not only to ordinary suits, but to every kind of legal proceeding affecting the property. Thus, while a railroad is in the possession of a receiver of a court of the United States, a telegraph company can acquire no title to a right of way over the line of the railroad by proceedings for condemnation in a state court.[3]

Objection was made in the Supreme Court of the United States that a junior mortgagee could not file a bill of foreclosure without leave, while the mortgaged premises were at the time in the possession of a receiver appointed in a former suit in the same court. In reply to this Mr. Justice Strong said:[4] "If there could, under any circumstances, be any force in this objection, there is none now. Both suits were brought in the same court; these appellants appeared, answered, and cross-examined witnesses, and made no allegation that the suit had been brought without leave

[1] Cowdrey *v.* Galveston, Houston & Henderson R. R. Co. 93 U. S. 352; *S. C.* 9 Am. Ry. Rep. 361.

[2] Hale *v.* Duncan, U. S. C. C. for Miss. 6 Wash. L. R 285; 6 Reporter, 422.

[3] Western Union Telegraph Co. *v.* Atlantic & Pacific Telegraph Co. 7 Biss. 367.

[4] Jerome *v.* McCarter, 94 U. S. 734, 737.

until about a year and a half afterwards. It was then too late. They must be held to have acquiesced; and, if not, leave of the court to commence and prosecute the suit must be presumed after the orders made to facilitate its progress."

500. In what courts a receiver may be sued. — The court under which the receiver is acting may take cognizance of the question of the receiver's liability for his official acts, or may permit the party aggrieved to sue at law, unless the jurisdiction of the court in the matter be assailed, in which case it must assume exclusive jurisdiction.[1] As a general rule, receivers are amenable solely to the court by which they are appointed; but this rule does not apply when citizens of another state seek remedy against them in such other state, and the receiver's liability has already been determined by the courts of the state in which he was appointed.[2] Ordinarily, however, a receiver cannot be sued for assets in his hands without first obtaining leave of the appointing court.[3] But the decree of court appointing a receiver entitles him to protection in the possession of such property only as he is entitled to take possession of it. When he takes possession of property to which he has no claim, he is not acting as the officer or representative of the court, but as a mere trespasser. The rightful owner of a locomotive engine, which a railroad company in the hands of a receiver never had any interest in, may take possession of it by a replevin suit, without first obtaining leave of the court appointing the receiver, although the engine is, at the time, used upon the road.[4]

The court, whose officer a receiver is, may restrain persons within its jurisdiction from prosecuting suits in foreign courts, whereby the earnings of a railroad in the hands of the receiver are locked up by attachment or trustee process.[5] The court in such case acts upon the ground that the party upon whom the order is made is within the jurisdiction of the court; that the receiver, as the officer of the court, is entitled to protection while in the proper discharge of his duty; and that persons interfering with his col-

[1] Klein *v.* Jewett, 26 N. J. Eq. 474; Meara *v.* Holbrook, 20 Ohio St. 137.

[2] Paige *v.* Smith, 99 Mass. 395.

[3] De Graffenreid *v.* Brunswick & Albany R. R. Co. 57 Ga. 22.

[4] Hills *v.* Parker, 111 Mass. 508.

[5] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. 46 Vt. 792; Barton *v.* Barbour, Sup. Ct. D. C. 1877, 6 Wash. L. R. No. 6.; 6 Cent. Law Jour. 201.

lecting the earnings of the road in his possession are guilty of contempt of court.

The question whether a receiver is liable to action in a court other than that from which he has received his appointment is one upon which there is some conflict of authority. The English doctrine is that a receiver is an officer of the court, his possession the possession of the court, and that without leave of such court no action can be maintained against him. Such, also, is the doctrine supported by the weight of authority in this country.[1]

501. A court making the appointment of a receiver may draw to itself all controversies to which the receiver is a party; yet it does this by acting directly upon the parties, and not by challenging the jurisdiction of other tribunals.[2] The mere fact of the appointment constitutes no plea to the jurisdiction of other courts; their ordinary jurisdiction is in no way affected by the appointment, in respect to matters in which the receiver may be interested, or which affect the property placed in his hands.[3] The court appointing the receiver is not thereby compelled to assume jurisdiction of all controversies to which the receiver may become a party, but may leave their determination to any court of appropriate jurisdiction.[4] It may assert its right to take all such controversies to itself, by acting directly upon the parties, and compelling them to proceed nowhere else than in its forum. Its power is unlimited for purposes of protection to restrain by injunction all suits in other courts against the receiver, or to punish as for a contempt any interference with its officers by force or by action, but it may use its discretion in this respect.[5] Thus a suit was brought in a court of the State of Kansas by a county treasurer against the St. Joseph and Denver City Railroad Company to recover certain taxes, after a receiver of the company had been appointed by the Circuit Court of the United States. The petition alleged the appoint-

[1] See article by Mr. High, 2 South. Law Rev. 576, October, 1876, and cases cited; Wiswall *v.* Sampson, 14 How. 52, 65.

[2] St. Joseph & Denver City R. R. Co. *v.* Smith, 19 Kans. 225; 6 Reporter, 331.

[3] Blumenthal *v.* Brainerd, 38 Vt. 402, 407.

[4] Hills *v.* Parker, 111 Mass. 508; St. Joseph & Denver City R. R. Co. *v.* Smith, *supra*.

[5] St. Joseph & Denver City R. R. Co. *v.* Smith, *supra*, per Brewer, J.; Kinney *v.* Crocker, 18 Wis. 794; Chautauqua County Bank *v.* Risley, 19 N. Y. 369.

ment of the receiver and his possession and control of the road. Without the issue or service of any process the company and receiver filed a joint answer, in which they admitted that a portion of the taxes were properly chargeable against the company, and consented that judgment might be rendered against them in the action for that amount. They also alleged the appointment of the receiver by the United States Circuit Court, that he was not amenable to the process of the state court, and prayed that as to him the suit might be dismissed; but it was held that the state court had jurisdiction, and might properly render judgment against the receiver. It is to be presumed in such case that if the Circuit Court in its discretion deemed it best to draw to itself this controversy, it would have done so. Moreover, it would seem that the receiver, having voluntarily come into court, admitted that a part of the claim was due, and consented that judgment might be rendered against him, could not be allowed afterwards to question the jurisdiction of the court.[1]

502. The proper remedies against a receiver. — A receiver in possession of property represents the court, and acts as its representative in the interest of all persons concerned in the property. There can be no interference with his possession except with leave of court. Any person claiming the property, or any interest in it, may present his claim to the court by petition, or may be made a party to the pending suit, and litigate his claim in that; or he may, by leave of court, bring a suit at law for the recovery of the property. The receiver will not be ordered to deliver the property to a claimant until his right is established in one of these modes; and care will always be taken to protect the receiver from personal liability or loss. In accordance with these general principles, one who claims rolling stock in possession of a receiver should try his title to it either by an equitable proceeding by petition, or in the pending suit; or, upon obtaining leave of court, by a suit at law for possession. An action of trover is not an appropriate remedy for trying the question of title, because that is not a suit for the possession, but is an attempt to hold the receiver personally liable for the value of the property. A demand upon the receiver for possession and his refusal to deliver it do not constitute a conversion on his part, and lay the foundation

[1] St. Joseph & Denver City R. R. Co. *v* Smith, 19 Kans. 225.

for such a suit.[1] Whether in any case an action of trespass or trover can be maintained against a receiver, when he rightfully takes possession of the property, is questionable. If the property be real estate, so that the title can be tried in an action of trespass without changing such title, or rendering the receiver liable for the value, perhaps there would be no objection to its maintenance. Or, if he has received the rents of real estate, or has sold personal property, by order of the court, perhaps the amount in his hands may be claimed in a suit at law. But a claim to cars, engines, or like property in the possession of a receiver, cannot be enforced as a claim for damages.[2]

An original bill against a receiver by a party to the suit in which the receiver was appointed is unnecessary, and a contempt of court. The proper mode of proceeding is by petition in the same cause, or by motion in that cause to obtain leave to prosecute an independent suit either at law or in equity.[3]

503. A statute authorizing suits against receivers does not avail against this rule. — The settled rule, that a suit cannot be commenced against a receiver without leave being first obtained from the court appointing such receiver, is not changed, as regards the courts of the United States, by a statute of a state[4] which provides that all receivers appointed by any court, and trustees and assignees running or operating railroad trains in that state, carrying either freight or passengers, may be sued in the several courts of that state in all matters *ex contractu* and *ex delicto* arising after their appointment, without leave of the court appointing or controlling them being first had; and that such suits may be prosecuted to final judgment, and satisfaction may be had out of any property held by them in their fiduciary capacity. No state can pass any law regulating, or in any manner affecting, the jurisdiction and practice of the federal courts.[5]

504. An execution cannot be levied upon property in the hands of a receiver without permission of the court whose officer

[1] Morrill *v.* Noyes, 56 Me. 458.

[2] Per Davis, J., in Morrill *v.* Noyes, *supra*.

[3] Payne *v.* Baxter, 2 Tenn. Ch. 517.

[4] Act of Jan. 6, 1877, of Mississippi. A similar statute of the State of Ohio gives leave to sue a receiver in the courts of that state without leave previously granted. Laws 1872, p. 31, § 1.

[5] Hale *v.* Duncan, U. S. Circuit Ct. N. Dist. of Miss. 7 Cent. L. J. 146.

the receiver is. That court may order the sheriff to withdraw his levy and answer for contempt in making it.[1] If it could be taken piecemeal from the custody of the receiver, the remedy of the creditors under the mortgage would be of little value. The remedy of one who claims that the property was not legally covered by the mortgage, or that, for any reason, it is not legally held by the receiver, is to apply to the court which appointed the receiver to ask its discharge out of custody, in order that he may proceed against it.[2]

The fund in the hands of a receiver cannot be disposed of by the mortgagor to the prejudice of the mortgagee; and the creditors of the mortgagor, having no greater rights in this respect than the mortgagor himself, cannot reach this fund by attachment or trustee process.[3] The possession of the receiver is the possession of the court itself. This rule is applicable not only to property actually in the hands of the receiver, but to that of which he has constructive possession. Any unwarranted interference with the property, either by taking forcible possession of it, or by legal proceedings begun without the sanction of the court appointing the receiver, is a direct and immediate contempt of court, punishable by attachment.[4] The commencement and prosecution of a suit against the receiver by garnishee process, to reach a debt or funds belonging to the company, of which he is made receiver, without the sanction of the court appointing him, is such an interference. Such a proceeding is an attempt to deprive the receiver of credits to which he, and he only, is lawfully entitled, and hence is a direct interference with the court in its administration of the estate over which it has appointed its receiver.

505. Any wilful interference with a receiver in the possession of the property placed in his charge is a contempt of the

[1] Coe *v.* Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372; Russell *v.* East Anglian R. Co. 6 Railway Cases, 501; 3 Mac. & G. 151; Skinner *v.* Maxwell, 68 N. C. 400.

[2] Robinson *v.* Atlantic & Great Western Ry. Co. 66 Pa. St. 160. See Potts *v.* Warwick & Birmingham Canal Navigation Co., Kay, 142; Bowen *v.* Brecon Ry. Co. L. R. 3 Eq. 541.

[3] Newport & Cincinnati Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673, 709.

[4] Richards *v.* People, 81 Ill. 551. In this case an attorney, who persisted in a garnishee process against funds which the receiver was entitled to collect, was punished by fine and imprisonment.

authority of the court, and punishable as such;[1] and it matters not whether such interference be under the form of law, as for instance when one seizes the property by the process of another court, or whether possession be forcibly taken by a violent mob, as was the case during the railroad riots in the summer of 1877. Accordingly rioters and strikers, who at that time prevented receivers from running trains upon roads under their charge by forcibly seizing the property, were rightly punished by imprisonment for acting in contempt of court.[2] Although the power to punish for contempt is limited to the misbehavior of persons in its presence, or so near as to obstruct the administration of justice, yet the disobedience of or resistance by any person to any lawful writ, process, order, rule, decree, or command of the court, anywhere within the jurisdiction of the court, is treated in as summary a manner as if the contempt were committed in the actual presence of the court. The accused are not entitled as of right to a trial by jury, but the court will proceed in a summary manner to hear the case and order punishment. But the court will not take this summary action except in cases free from doubt, and where the overt acts of contempt are clearly and distinctly proved.[3]

506. There are not wanting instances in which courts, jealous of their power and jurisdiction, have denied the rule that a receiver is the agent and officer of the court by which he is appointed, and amenable to no other tribunal, and have undertaken to exercise authority over receivers appointed by another court without its consent. Thus, an injunction having been granted by a court of the State of Illinois against the Cairo and Vincennes Railroad Company restraining its agents from using in a particular way a street of the city of Cairo, receivers of the road were subsequently appointed by the Circuit Court of the United States, who entered upon their duties, and apparently used the street in disregard of the injunction. A proceeding for contempt was thereupon instituted in the state court against the receivers without reference to the court appointing them. Upon appeal to the Supreme Court of the state the judgment of the court below, holding the receivers amenable to that court, was affirmed. The decision

[1] Robinson *v.* Atlantic & Great Western R. R. Co. 66 Pa. St. 160; Fripp *v.* Bridgewater, &c. Ry. Co. 3 W. R. 356.

[2] Secor *v.* Toledo, Peoria & Warsaw Ry. Co. 7 Biss. 513.

[3] King *v.* Ohio & Miss. Ry. Co. 7 Biss. 529.

proceeds upon the ground that receivers are the agents of the corporations whose property they are put in charge of.[1] "The injunction was against the corporation as a legal entity, and its agents, servants, &c. When the receivers were appointed by the federal court there was no change in the corporate body. Its existence was intact, with its legal functions unimpaired, but simply its acts were performed by agents appointed by the court, and not by the corporation. And the agents appointed by the court to perform its duties and exercise its functions are legally its agents, although they are under the direction of the court appointing them within the limits of its charter. The court only authorizes the receivers to exercise the privileges and perform the duties prescribed by the charter."

But granting that a court assuming the management of a corporation is bound to respect the limitations imposed upon it by its charter and by the law, the question remains what tribunal shall control the agents of the court, and determine whether they are acting within the limits of the charter and of the law? Upon sound legal principles it has been established that the court appointing the receivers is the only one that can exercise any authority over them. If other courts, without the consent of the court appointing the receivers, were allowed to exercise authority over its agents, this court would in fact submit itself to the control of every other court which might be invoked to sit in judgment upon the acts of receivers. These officers would cease to be the agents of the court that appointed them; and whose agents they would be it might be difficult to determine. The administration of equity through this instrumentality would thus become impossible.

507. The courts of Wisconsin and Iowa have also departed from this doctrine, and held that in all cases where there is no attempt to interfere with the actual possession of the receiver, a suit may be prosecuted against him, in any court of competent jurisdiction, without the permission of the court from which the receiver derived his appointment. In the former state,[2] an action in its courts against a receiver who was operating a railroad under

[1] Safford *v.* People, 85 Ill. 558; 5 Cent. L. J. 384; 17 Albany Law J. 209.

[2] Kinney *v.* Crocker, 18 Wis. 74; and see St. Jo. & Denver City R. R. Co. *v.* Smith, Sup. Ct. Kansas, July T. 1877, 6 Cent. L. J. 59; 19 Kans. 225.

the appointment of the District Court of the United States, for personal injuries occasioned through the negligence of his servants, was maintained without previous leave obtained from the latter court to prosecute the action. The Supreme Court of the state declared that, although a plaintiff desiring to prosecute a legal claim for damages against a receiver might, in order to relieve himself from liability to have his proceedings arrested under the authority of a court of equity to restrain suits at law under some circumstances, very properly obtain leave to prosecute, yet his failure to do so is no bar to the jurisdiction of the court at law. The court object that, inasmuch as the federal courts have jurisdiction of proceedings against railroads, the result of a requirement that leave should be first obtained to prosecute a suit against a receiver would be to draw into those courts not only the jurisdiction of all actions respecting the title to property in the custody of a receiver, but all actions for the non-performance of contracts by him, and the state courts would be absolutely divested of jurisdiction unless the federal courts saw fit to grant it.

This case was cited, and its doctrine approved, in the recent case of *Allen* v. *Central Railroad Company* in Iowa.[1]

508. These cases were assailed with much vigor, and their doctrine denied in a recent case before the Circuit Court of the United States for the District of Iowa. There was an attachment for contempt in commencing a suit in a court of the State of Iowa against a receiver appointed by the United States Circuit Court. Judge Love, after referring to these cases, said :[2] "In my judgment, the doctrine of the Iowa decision contravenes the whole scheme of equity jurisdiction in the matter of appointing receivers, and in the taking of possession, through them, of the property in litigation. The Court of Equity takes cognizance of a suit against an insolvent company or corporation, and where danger exists that the litigation may prove fruitless to creditors, by waste or a fraudulent disposition of the property, the court will take it into possession by the appointment of a receiver. The property thus becomes a fund subject to the disposition of the court, and under

[1] 42 Iowa, 683. The court in this case also cite Paige *v.* Smith, 99 Mass. 395, and Hills *v.* Parker, 111 Mass. 508, in support of the position taken, but they are very far from being authorities in support of it.

[2] Thompson *v.* Scott, 22 Int. Rev. Rec. 376; 4 Dill. 508.

its exclusive control. The principle that the court which has possession and control of a fund has the exclusive right to determine all claims and liens asserted against it is fundamental. Hence, every court of equity, in such a case, assumes to decide all controversies touching the subject matter of the suit and the fund; to determine the existence and priority of all liens; to adjust and settle all disputed claims; marshal the assets, and, finally, to distribute the surplus among the general creditors *pro rata*, upon its own principle of equality among creditors. The very ground and reason of this jurisdiction is the inadequacy of mere legal remedies. But, according to the Iowa decision, there is no reason why any party claiming satisfaction out of the fund may not, without the consent of the receiver's court, assert his rights in any competent court, provided he does not attempt to disturb the possession of the receiver; and thus may the decision of the claims and controversies involved in the litigation be withdrawn from the Court of Equity, where they properly belong, and transferred to the courts of law. And the result would be that claims against the fund would be determined, not by the court having jurisdiction of the case and control of the fund, but by other and different tribunals. . . . . The view thus presented applies with redoubled force to railroad foreclosure suits in the United States Circuit Court. The non-resident citizen comes here to set up and enforce the lien of his mortgage, for the very reason that he thinks he would be exposed to injustice in the state courts from local prejudice. But no sooner does he get the railroad property in the hands of a receiver than that officer, if the doctrine of the Iowa court be sound, is exposed to suits in the state courts upon claims and demands of all kinds, and thus the substantial end for which the non-resident complainant comes here is practically defeated. The receiver himself has no beneficial interest in the controversies waged against him in the local courts, and the litigation is practically between the non-resident citizen and the citizen of Iowa. Suits may be brought, and judgments innumerable rendered, against the receiver, all along the line of the railway, by justices of the peace and other local courts. These judgments may, if valid, be made liens upon the railway property, and the federal court must recognize and pay them; the state courts thus take from the former court the power of determining, first, what debt shall be paid out of the funds in its hands; second, what claims shall be made liens upon

the mortgaged property. Thus would the federal court sit merely to register and pay the judgment and decrees of the state courts. . . . . But assuming that this court would not sit here merely to register the judgments and decrees of the state courts, and to pay them without inquiry out of the trust fund in our possession, it may be asked what harm will result to the non-resident creditors from permitting suits to proceed against receivers? I answer that such judgments, even if we repudiate them and refuse to pay them, would cast a cloud upon our title, and seriously affect a sale of the railroad property. When the receivership is at an end, and the property no longer under our control, but in the hands of a purchaser at the foreclosure sale, I know of no reason why the state court might not proceed to enforce the judgment by execution and sale. At all events, the apprehension of such a result would cast such a cloud upon the title as effectually to defeat an advantageous sale, and this furnishes an all-sufficient reason why we should, by injunction and by process of contempt, prevent the prosecution of suits against our receivers."

The soundness of the doctrine set forth in this judgment is beyond question, and the position of the state courts to the contrary is wholly indefensible.

III. *A Receiver's Liability to Suit for the Negligence of his Employees.*

509. Whether a receiver is liable for the negligence of his employees. — There is much diversity of opinion upon the question whether a receiver is liable for the negligence of his employees in the same manner and to the same extent that a railway company, operating its road, is liable. On the one hand, a receiver, in operating the road, is said to exercise the powers and rights of a common carrier, and is, therefore, subject to all the duties and liabilities of a common carrier.[1] Whether the receiver is regarded as the officer of the law, or the representative of the proprietors of the corporation or its creditors, or as combining all these characters, it is said he is intrusted with the powers of the corporation, and must, therefore, necessarily be burdened with its duties, and subject to its liabilities. There can be no such

[1] Blumenthal *v.* Brainerd, 38 Vt. 402; Paige *v.* Smith, 99 Mass. 395; Klein *v.* Jewett, 26 N. J. Eq. 474; Meara *v.* Holbrook, 20 Ohio St. 137; 5 Am. R. 633; Kinney *v.* Crocker, 18 Wis. 80; Allen *v.* Central R. R. Co. 42 Iowa, 683.

thing as an irresponsible power, exerting force or authority, without being subject to duty, under any system of laws framed to do justice. It is an inseparable condition of every grant of power by the state, whether expressed or not, that it shall be properly exercised, and that the grantee shall be liable for injuries resulting directly and exclusively from his negligence in its use.[1] In a recent case in Kentucky, in which, however, the question under consideration was not involved, Mr. Justice Lindsay, upon the functions of a receiver as a common carrier, said: "The receiver of a line of railways is not the mere passive agent or officer of the court, charged with the simple duty of preserving the property intrusted to his care, and of collecting the rents and profits arising directly out of the thing mortgaged, and holding them until the rights of the litigants shall be determined. His duties comprise the management and operation of the roads. He, *ex necessitate*, becomes a common carrier, and, in order to preserve the mortgaged property, is compelled to discharge the duties of a *quasi* public corporation."[2]

On the other hand, the position of a receiver while operating a railroad in his official capacity is regarded as analogous to that of a public officer, who is not responsible for the negligence of others through whom he may be compelled in part to act.[3]

510. If a receiver be liable as a common carrier, it is no defence at law that the defendant is a receiver acting under the authority of a Court of Chancery. When, therefore, a suit at law is brought against a person who is in fact a receiver, for loss and damage sustained under his management of a railroad, the Court of Chancery which appointed him may in its discretion enjoin the prosecution of the suit at law.[4] If, however, a receiver desires the protection of the court, whose officer he is, he should apply for an injunction, and in case he fail so to do, the action at law may proceed as though permission to bring it had been obtained from such court.[5] He is deemed to have waived, if need be, such ground of objection to the action, or to have voluntarily elected to defend the action at law. The mere fact that the de-

[1] Klein *v.* Jewett, *supra*, per Van Fleet, V. C.

[2] Douglass *v.* Cline, 12 Bush (Ky.), 608, 628, per Lindsay, J.

[3] See § 511.

[4] Morse *v.* Brainerd, 41 Vt. 550.

[5] Camp *v.* Barney, 4 Hun (N. Y.), 373.

fendant was acting as a receiver under the appointment of a Court of Chancery is not recognized as a defence to a suit at law for a breach of any obligation or duty which had been assumed by him while acting as such receiver.[1] "As between a receiver and the parties interested in the trust, the receiver would be responsible for negligence; but he might be liable to other parties in a larger or stricter degree of responsibility. The assumption by the defendants of the peculiar duties and extraordinary responsibilities arising from the relation of common carriers, is not to be considered as necessarily, if at all, incompatible with any duty or responsibility imposed upon them as receivers. The plaintiff's evidence tended to show that the defendants were managing and controlling a long line of railroad, and conducted and held themselves out as common carriers over that line. If in fact they were common carriers over that line of railroad, we think that it is no defence to an action at law, for a breach of a duty or obligation arising out of business intrusted to them in that relation, that they were running and managing the line of railroad as receivers under an appointment of the Court of Chancery." [2]

Primarily, any person having possession and control of, and actually operating a railroad, is at law liable as a common carrier for injuries to passengers or freight occasioned by his misconduct or negligence, or that of any of his servants. He is thus the acting, directing, and governing power in operating the road, and is the only tangible principal known to the public. It matters not whether he be a trustee, a lessee, or a mere intruder into the franchise of the corporation.[3] The only exception in favor of a receiver, or distinction between them or any other trustee, is, that he is an officer of the court appointing him, and is under its control and protection.[4]

Receivers in chancery in operating and managing railroads are thus regarded as sustaining to persons dealing with them the character of common carriers. They may at all times invoke the aid of the court appointing them in any matter affecting their duty or liability under their receivership; yet, waiving this, they are amenable in the common law courts to actions for negligence as carriers.[5] This liability is extended to losses or damages to prop-

[1] Blumenthal *v.* Brainerd, 38 Vt. 402.

[2] Per Kellogg, J., in Blumenthal *v.* Brainerd, *supra*.

[3] Sprague *v.* Smith, 29 Vt. 421.

[4] Camp *v.* Barney, *supra*.

[5] Newell *v.* Smith, 49 Vt. 255; Cutts *v.* Brainerd, 42 Vt. 566.

erty taken charge of by such receivers, although happening after the property has passed over their own road, and while in the charge of other carriers over whose line of road the property was destined and directed.[1]

511. According to another view a receiver as the agent of the court occupies a position analogous to that of a public officer who is not answerable for the acts of those under him. The Court of Appeals of New York, in a recent case,[2] held that a receiver operating a road in his official capacity is not liable in an action for negligence causing the death of a passenger, where no personal neglect is imputed to him, either in the selection of agents or in the performance of any duty, but where the negligence charged is that of a subordinate whom he necessarily and properly employed in compliance with the order of the court. It is conceded that trustees and mortgagees in possession of roads, and operating them for the benefit of the bondholders, are liable for injuries sustained by reason of the negligence of persons employed by them.[3] They are regarded as the owners of the roads, and the real principals, receiving the earnings, and having the benefit of the services of the employees, and the fact that they act in a representative capacity is unimportant. The employees are their servants, and whether they operate the road as mortgagees in possession, trustees, or lessees, is not material, so long as they take the earnings for themselves or for those they represent.[4] But there is no principle upon which a receiver or other officer of a court, merely obeying the orders of the court, having no interest in the prosecution of the work, and deriving no profit from it, should be answerable except for his own acts and neglects.

These views were applied by the Supreme Court of New York to the case of an injury received by the plaintiff upon the Ogdensburgh and Lake Champlain Railroad, a New York corporation, but leased to the defendant and others as receivers of the Ver-

[1] Morse *v.* Brainerd, 41 Vt. 550; Cutts *v.* Brainerd, *supra*; Newell *v.* Smith, *supra*.

[2] Cardot *v.* Barney, 63 N. Y. 281, Chief Justice Church dissenting.

[3] Rogers *v.* Wheeler, 43 N. Y. 602; *S. C.* 2 Lans. 486; Ballou *v.* Farnum, 9 Allen (Mass.), 47.

[4] Citing and distinguishing upon this ground Ballou *v.* Farnum, 9 Allen (Mass.), 47; Lamphear *v.* Buckingham, 33 Conn. 237; Barter *v.* Wheeler, 49 N. H. 9; Rogers *v.* Wheeler, 43 N. Y. 598; Sprague *v.* Smith, 29 Vt. 421.

mont and Canada Railroad Company, a Vermont corporation, placed in their hands by the Court of Chancery of that state.[1] The receiver was held not to be liable, because in making the lease he acted officially and as the agent of the Vermont corporation.

512. Upon the debated question of a receiver's liability as a common carrier, it would seem at first sight that the weight of authority is very decidedly in favor of such liability; that the courts of Vermont, Massachusetts, New Jersey, Ohio, Wisconsin, and Iowa favor this view of the law, while opposed to it are the courts of New York alone. But it is to be observed that in all the several Vermont cases the defendants were receivers of the same railroads, the Vermont Central and Vermont and Canada; that in several of the cases they are described not merely as receivers, but as trustees; and that ultimately the Supreme Court of that state has decided that the persons who have been in possession of these railroads for sixteen years and more were not in possession as receivers of the Court of Chancery, but as trustees for the bondholders;[2] and there is no doubt that trustees operating a railroad are liable as common carriers in the same way that the railroad company itself would be liable. The Massachusetts case was an action against the trustees or receivers of the same railroad, and expressly followed the case of *Blumenthal* v. *Brainerd*, without affirming its soundness, upon the ground that it was impossible to accord to the defendants in Massachusetts an exemption from the ordinary common law liabilities of common carriers more extensive than they are allowed in the state in which they were appointed receivers, and in which the accident occurred.[3] In the Ohio case,[4] the receiver was appointed under

[1] Kain *v.* Smith, 11 Hun, 552. Learned, P. J., dissenting, said: "Whatever may be the defendant's liability in respect to the management, in Vermont, of the road of which he is supposed to be receiver, when he comes into this state and obtains complete control of a railroad, not by virtue of his appointment as receiver, but by a contract which he voluntarily made; when he takes possession of this railroad, and agrees to assume the duties of the company as a common carrier, and when he receives the earnings, to be disposed of as he directs, he is, as it seems to me, the owner and proprietor, during the time agreed upon, of the property, and the master of the persons employed by him in performing the duties thus assumed."

[2] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. 50 Vt. 500.

[3] Paige *v.* Smith, 99 Mass. 395.

[4] Meara *v.* Holbrook, 20 Ohio St. 137, citing and relying upon Blumenthal *v.* Brainerd, *supra*, and Paige *v.* Smith, *supra*.

the express authority of a statute which conferred upon him, with other powers, that of bringing and defending suits "in his own name, as *receiver*," and the suit was brought against him in his official capacity. In *Kinney* v. *Crocker*,[1] the Supreme Court of Wisconsin assumed the liability of a receiver for the negligence of his employees, but did not discuss this question, — the principal question considered being whether a state court could take jurisdiction of the action without leave of the federal court which had appointed the receiver. In *Allen* v. *Central Railroad Company*,[2] the negligence complained of occurred before the receiver had assumed control of the road, and the suit was not against the receiver but against the company. The decision in *Klein* v. *Jewett*[3] was by the Vice Chancellor of New Jersey, who, while relying upon the authority of the cases above mentioned, strongly maintains the liability of the receiver upon principle.

In conclusion it seems proper to remark that on principle the case of *Cardot* v. *Barney*[4] is sound; that the doctrine of *respondeat superior*, as between a receiver acting under the direction of a Court of Chancery and his employees, has no application. But considerations of policy may very likely lead to the adoption of the rule, that a receiver shall not be allowed to exercise the rights and powers of a common carrier without also being held subject to a common carrier's duties and liabilities.

Under a statute of the State of Georgia, allowing an employee of a railway company to recover damages against the road for a personal injury done him through the negligence of another employee in the same service, it was held that the employee of a receiver is not an employee of a railroad company within the terms of that statute, so as to make the receiver liable to action in such case.[5]

But even if it be regarded as an open question whether the receiver of a railroad, appointed by a court and operating the road under its direction, is liable for injuries done upon the road to person or property, it is regarded as certain that a receiver appointed by the governor of the state, under a law providing for such appointment, is a public agent, and, as such, is not liable for

[1] 18 Wis. 80. See § 507.
[2] 42 Iowa, 683.
[3] 26 N. J. Eq. 474.
[4] 63 N. Y. 281.
[5] Henderson *v.* Walker, 55 Ga. 481; Thurman *v.* Cherokee R. R. Co. 56 Ga. 376.

the wrongs or negligence of his employees, but only for his own wrongful acts or delinquencies.[1]

513. A receiver is not personally liable for injuries done through the neglect or misconduct of those employed by him in the performance of the duties of his office.[2] He is only liable in an action brought against him as receiver, and any judgment recovered must be made payable out of the fund in his hands as receiver. He is not individually the owner of the property in his charge, and he has neither a general nor special property in the road or its earnings. The property is in court for management and administration, and the receiver is an officer of the court, obeying its orders and carrying out its directions. It would be a great hardship to impose upon him the hazards and responsibilities which attach to individuals acting by agents appointed for their own convenience and profit. The receiver of a railroad must of necessity operate the road through the employment of agents, and when he has prudently selected his agents he has discharged his full duty, and ought not to be held to guarantee the acts of the agents employed. While there is good reason that one employing another in his business should be responsible for his acts, there is no principle upon which a receiver or other officer of a court should be answerable except for his own neglect and misconduct. Where, therefore, a suit was brought, and a judgment entered against a receiver personally, upon appeal the record and proceeding were ordered to be modified so as to make the judgment stand against him as receiver only.[3] But as will presently be noticed, a judgment against a receiver for damages occasioned through the negligence of his employees cannot be enforced as against the assets in his hands in preference to the claims of mortgage bondholders.[4]

514. Receivers who have wilfully and corruptly exceeded their power are liable for the actual damage sustained by reason of their misconduct, but for nothing more. Where, for in-

[1] Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44; Hopkins *v.* Connell, 2 Tenn. Ch. 323, citing Mersey Docks' Trustees *v.* Gibbs, L. R. 1 H. L. 93.

[2] Camp *v.* Barney, 4 Hun (N. Y.), 373, per Mullin, P. J.; Cardot *v.* Barney, 63 N. Y. 281.

[3] Camp *v.* Barney, *supra.*

[4] See § 515.

stance, they have been authorized to issue certificates of indebtedness payable in ten years at eight per cent. interest, under the restriction that they should not sell them for less than ninety cents on the dollar, and they hypothecated them for a half or a third of their value, the court held that they were not chargeable in their account for the full value of the certificates so hypothecated, or even with their value at ninety cents on the dollar; for the lenders were bound to take notice of the terms upon which the certificates were authorized, and were bound to return so many of them as were not necessary to secure the amounts advanced. The actual damage sustained by the conduct of the receivers would therefore be merely nominal. If they acted in good faith, but under a mistaken view of their powers, they would perhaps not be liable at all.[1]

515. **A judgment for negligence cannot be enforced as against rights of mortgagees.** — Under another view of the subject, although a judgment may be obtained against a receiver for negligence, on the part of employees, yet the judgment cannot be enforced as against mortgagees. The appointment of a receiver does not derange the priority of existing liens upon the property, or in any way impair or postpone them, except so far as the court may find it necessary, for the preservation of the property, to authorize the borrowing of money upon a pledge of it.[2] Consequently, it has been held that a person who has recovered a judgment against the receivers of a road, for injuries received by him while travelling upon the road under their management, is not entitled to payment out of the earnings of the road, or out of the proceeds of a sale of it, in preference to the mortgage creditors. "It is too clear for argument," says Judge Woods,[3] "that, if the road had been run by the president and directors when the injury was sustained, no such claim could have priority. The party would have travelled over the road, taking the risk of the ability of the company to respond, just as every man who obtains a right or contract does so with the risk of the ability of the party to answer to him. The receivers of the court were merely appointed

[1] Stanton *v.* Ala. & Chattanooga R. R. Co. 2 Woods, 506.

[2] Norway *v.* Rowe, 19 Ves. Jun. 144, 153, per Lord Eldon.

[3] Davenport *v.* Alabama & Chattanooga R. R. Co. 2 Woods, 519.

to act instead of the president and directors, except so far as the orders of the court otherwise direct, and the liability stands on the same footing as if it had been created by the president and directors, unless a higher right can be assigned to it under the orders of the court. . . . . It is clear that such a lien is not one of the incidents to running a road, nor was its creation necessary to procure traffic and travel; nothing of the kind is intimated in the application for a receiver, and no such view or idea is presented in the order. . . . . The exercise of power by a court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts. The party has a right to be allowed his claim, to be paid from an excess remaining. He has the same right against the property which he could have had if the road had been run by the president and directors when his right accrued, and none other."

IV. *The Company itself is not liable after the Receiver has assumed Control.*

516. The railroad company itself, whose property is in the hands of a receiver is not ordinarily liable for injuries received through the acts of persons under his control or through the running of the road under his charge.[1] His acts are not the acts of the corporation, nor is his possession the possession of the corporation. He is under the control of the court that appointed him, and his possession is the possession of the court. It would be a severe rule, and one founded on no principle, that would render the railroad company responsible for the negligence of the agent of the court that had deprived it of the possession of the road. To an action against the company, it is sufficient to answer that at the time the injuries were inflicted on the plaintiff the railroad, with the rolling stock and all the company's property, was in the actual control of a receiver duly appointed. It is not necessary that the answer should set forth a copy of the order appointing the receiver.[2] The corporation itself cannot be held liable for goods lost or not delivered under a contract made with receivers for their transportation and safe delivery; the road being in the hands

[1] Bell *v.* Indianapolis, Cincinnati & Lafayette R. R. Co. 53 Ind. 57; Ohio & Mississippi R. R. Co. *v.* Davis, 23 Ind. 553.

[2] Bell *v.* Indianapolis, Cincinnati & Lafayette R. R. Co. *supra.*

of receivers. The action only lies against the receivers, and no personal judgment can be rendered against them, but only one against them in their official capacity.[1]

517. But unless the possession of the receiver under a decree of court is exclusive, and the servants of the road are wholly employed and controlled by him, the company is not relieved from liability for injuries done by the servants employed in working the road. Where, for instance, a road is run on the joint account of a receiver of part of it, and of a lessee of the remaining part, the company, as well as the lessee, is liable for injuries committed by a servant employed upon the road upon a passenger, in improperly expelling him from a car, especially where the company has allowed tickets to be issued in its own name, in the same form as it had done before the road was leased, and the passenger apparently having no reason to know that the road was not still under the company's management.[2]

It is not necessary, of course, to obtain authority from the court which has appointed a receiver of a railroad to commence an action against the company itself. Nor is such consent necessary to continuing a suit commenced against a railroad company before the appointment of the receiver. Such appointment has not the effect to abate, bar, or continue an existing suit against the company. The receiver may interpose, however, when the plaintiff undertakes to interfere with the property by enforcing an execution.[3]

518. In determining the question whether the corporation is liable for injuries done after the appointment of a receiver, it is important to inquire whether the receiver has at the time of the injury entered upon the discharge of his duties and assumed control of the road. Thus a receiver of the Central Railroad of Iowa was appointed by the Circuit Court of the United States on the seventh day of January, 1875, and he was allowed fifteen days within which to give bonds. In a suit against the company for an injury which occurred to a passenger on the eighteenth day of the same month, there was no proof that the receiver had at

[1] Ellis *v.* Indianapolis, Cincinnati & Lafayette R. R. Co. 6 Am. Law Record, 288.

[2] Railroad Co. *v.* Brown, 17 Wall. 445.

[3] Toledo, Wabash & Western Ry. Co. *v.* Beggs, 85 Ill. 80.

that time assumed control of the road. Upon the contrary, there was some testimony tending to show that the defendant company was operating the road at that time. At any rate the Supreme Court of Iowa did not consider the question whether a railroad company could be made liable for damages resulting from the improper management of the road while in the hands of a receiver, involved in the record of the case.[1]

519. Liability of company as affected by statute. — Under a statute making receivers or other persons running or controlling any railroad in the corporate name of the company liable jointly or severally with such company, for stock killed or injured by the locomotive, cars, or other carriages of such company, an action may be brought against the company alone for such acts done while a receiver is in possession. The appointment of a receiver does not destroy the corporate existence. Its corporate powers and franchises are for the time being, so far as necessary for the operating of the road, conferred upon the receiver, but the corporate existence is left intact. Suits may be prosecuted against the corporation after the decree appointing a receiver, just as well as before.[2]

Where negligence on the part of those operating the road is not an element that is at all essential to a recovery, as for instance where a statute makes a railroad liable for cattle killed upon its track, in case this is not fenced, a railroad company has been held liable for stock thus killed, although the road is at the time operated by a receiver duly appointed by a competent court. Such a statute is regarded as in the nature of a police regulation, designed to promote the security of persons and property passing upon the road; and not only the terms of the law, but the reason of it as well, are regarded as applicable to roads operated by a receiver, equally with those operated by the servants of the company.[3]

520. A special receiver or assignee of the property of a railroad corporation, appointed in bankruptcy proceedings, involuntary on its part, is not an agent or servant of the cor-

[1] Allen *v.* Central R. R. Co. 42 Iowa, 683.

[2] Louisville, New Albany & Chicago R. R. Co. *v.* Cauble, 46 Ind. 277.

[3] McKinney *v.* Ohio & Miss. R. R. Co. 22 Ind. 99; Ohio & Miss. R. R. Co. *v.* Fitch, 20 Ind. 498.

poration, and therefore the corporation is not liable for damages occasioned by his negligence and that of persons employed by him in operating the road. In a suit against the Buffalo, Corry, and Pittsburg Railroad Company, it appeared that the accident, which was the occasion of the suit, occurred after the date of a sale made under an order of court by the receiver or assignee, but before the confirmation of the sale and delivery of the deed to the purchasers. It was contended in behalf of the plaintiff that the property and franchises and legal entity of the corporation had at the time of the accident passed to the purchasers who thereby became the corporators constituting the corporation, taking the place of the former stockholders; and that although the sale was not then confirmed, the deed, when given, related back to the time of the purchase. The Court of Appeals of New York replied, that, conceding this to be so, it did not follow that the purchasers were responsible for the negligence in operating the road, inasmuch as they then had no right to intermeddle with the road and had not in fact done so.[1] The persons operating the road were not employed by them, nor were they subject in any respect to their control. Neither had the purchasers taken the place of the preëxisting stockholders, becoming its corporators, and acquiring the corporate entity, although they acquired the property and the franchise of using it subject to the public obligations which had rested upon the defendant corporation. The statute authorizing purchasers under a foreclosure sale[2] to organize a new corporation does not make them stockholders in the existing corporation; were this so, the property purchased would be liable to all the existing debts of the corporation, and both the mortgage security and the rights of the purchasers might thus be entirely defeated.

Moreover, the defendant corporation in this case had been deprived, by the act of the law, of the possession of the road and of all control over those engaged in operating it; and by like act, the possession and control had been given to others. The defendant had nothing to do with operating the road. The fact that the profits earned became assets for the payment of the

[1] Metz *v.* Buffalo, Corry & Pittsburg R. R. Co. 58 N. Y. 61; and see, to same effect, as to liability of purchasers, Commonwealth *v.* Central Passenger Ry. 52 Pa. St. 506; Wellsborough & Tioga Plank Road Co. *v.* Griffin, 57 Pa. St. 417.

[2] Laws 1857, ch. 444.

debts of the corporation did not make it liable for the conduct of those who were in no sense its employees or servants.

V. *Discharge and Removal of Receiver.*

521. A receiver will be discharged when it appears that the security of the creditor no longer requires his continuance. — Upon the application of the Milwaukee and Minnesota Railroad Company for the discharge of a receiver of a portion of its line extending from Milwaukee to Portage, it appeared that this section of ninety-five miles constituted a link in an important route, which was in good condition, and whose gross annual earnings were $800,000; that the whole mortgage debt upon this was $2,200,000, upon which the interest was wholly paid; and the company proposed, on receiving possession, to pay to the second mortgagees, at whose instance the receiver was appointed, $300,000 or more. Judge Miller, sitting in the Circuit Court, was of opinion that there was no reason why the receiver should longer retain control of the property, especially as the decree in favor of the mortgagee would stand as security for his further claim, on which he could have an order of sale for any instalment of interest.[1]

In the same case a judgment creditor whose claim was less than twenty thousand dollars objected to the discharge of the receiver; but the judge did not consider the objection valid in view of the fact that this creditor had all the ordinary remedies for enforcing his lien, and had received only $1,000 for four years, during which the receiver had been in possession.

A lessee of a railroad holding the lease as security for a large debt, from whom the possession was taken by a receiver appointed at the instance of a mortgagee, upon the discharge of the receiver is entitled to have possession restored to him. But a creditor holding such lease, who has failed to pay sums which he stipulated to pay, and who has lost possession by reason of such failure, and has permitted the property to remain out of his possession for four years, is not entitled to have the possession restored to him.[2]

After the appointment of a receiver, upon the subsequent pay-

[1] Howard *v.* La Crosse & Milwaukee R. R. Co. 1 Woolworth, 49. See, also, *In re* Long Branch & Seaside R. R. Co. 24 N. J. Eq. 398.

[2] Howard *v.* La Crosse & Milwaukee R. R. Co. 1 Woolworth, 49.

ment of a part of the debt, the security being ample for the balance of the debt, and the decree being allowed to stand as a means of enforcing the mortgage upon a subsequent default, the receiver was discharged.[1]

In New York it is provided by statute [2] that neither the sale of the mortgaged property under foreclosure, nor the formation of a new corporation by the purchaser, shall interfere with the authority or possession of any receiver of the property and franchises aforesaid, but he shall remain liable to be removed or discharged at such time as the court may deem proper.

522. **The discharge of a receiver, like his appointment, is ordinarily a matter resting wholly within the discretion of the court** from which he received his appointment, and of course no appeal ordinarily lies from the order to the appellate court. But this is not always and absolutely so. Thus, while the parties to a foreclosure suit are litigating the amount of the mortgage debt, the appointment of a receiver of the property, and his discharge as well, belong properly to the discretion of the court in which the litigation is pending. But when the amount due has been passed upon by that court, and upon appeal has been finally fixed by the appellate court, the right of the mortgagor to pay that sum, and have a restoration of his property by a discharge of the receiver, is clear, and does not depend upon the discretion of the court. It is a right which the party can claim; and a refusal of the court to grant it is a judicial error which the appellate court is bound to correct, when the whole case is fairly before it.[3]

523. **Upon a motion to vacate an order previously made appointing a receiver he should not be heard in opposition,** as he has no standing in court for such purpose. It is not within his province to intermeddle in questions affecting the rights of the parties in interest, or the disposition of the property in his hands, except so far as his own rights are concerned in the adjustment of his accounts. Where, therefore, all the parties in interest concurred in the vacating of the receivership, but the court, upon the

[1] Souter *v.* La Crosse & Milwaukee R. R. Co. 1 Woolworth, 49.

[2] Laws 1876, ch. 446, p. 482.

[3] Milwaukee & Minn. R. R. Co. *v.* Soutter, 2 Wall 510.

objection of the receiver himself, while ordering the restoration of the railroad and its appurtenances to the company, required him still to receive and disburse its earnings and income, the order upon appeal was adjudged erroneous. The motion should have been granted so as to fully restore the possession, management, and control of the road to the owner, including, of course, the receipt and disbursement of its earnings.[1]

524. **The rescission of an order appointing a receiver after the commencement of an action of replevin or possessory warrant against him** for an engine, or other property, does not free him from liability upon a judgment against him, although he has surrendered the property to the railroad company of which he had been receiver; for when the suit was commenced he was in possession of the engine as the receiver of the company, and the plaintiff's rights against him were fixed as of that time. When he voluntarily turned over the engine to the possession of the company while the suit was pending against him for the possession of it, he did so at his own peril. The company could not have compelled him to surrender it until the plaintiff's claim to the possession of it had been decided.[2]

525. **Specific complaints against a receiver of maladministration of his trust will receive the attention of the court,** although brought to its notice in an irregular way, as for instance by a petition under an order for leave to answer in the name of the receiver in a foreclosure suit.[3]

The power to vacate an appointment of a receiver is implied in the power to appoint.[4] Like the power of appointing a receiver, the power to remove him rests in the discretion of the court; but this power should be exercised only for cause grounded in some consideration of justice or convenience. "It might be difficult," said Van Fleet, V. C., in a case before the Court of Chancery of New Jersey,[5] "if not impossible, to say what will be esteemed sufficient cause in every imaginable case; but it may be said gen-

[1] L'Engle *v.* Florida Cent. R. R. Co. 14 Fla. 266.

[2] Peacock *v.* Pittsburg Locomotive & Car Works, 52 Ga. 417.

[3] Coe *v.* N. J. Midland Ry. Co. 28 N. J. Eq. 31; *S. C.* 14 Am. Railw. Rep. 9.

[4] Railroad Co. *v.* Sloan, 31 Ohio St. 1.

[5] McCullough *v.* Merchants' Loan & Trust Co. 29 N. J. Eq. 217.

erally, if the receiver was an officer of the corporation at the time it became insolvent, and it appears proper that his conduct, as such officer, should be investigated, to see whether he has not obtained a benefit or advantage, which in equity he ought not to be permitted to retain, sufficient cause for his removal exists."

526. **It is ground for the removal of two receivers of a railroad that they have become hostile to each other** in the management of the road. Two receivers of the Kansas Pacific Railway, who had been appointed at the instance of the parties in interest for the purpose of representing the opposing views of the parties, having disagreed about the management of the road, were for this, in connection with other reasons, removed.[1] Among the other reasons given by the court were that the receivers had established separate places of business a thousand miles apart, and that neither of them was within two hundred miles of the road whose operations they controlled. "There is no necessity," said Mr. Justice Miller, "and a manifest impropriety, in having a receiver located in New York. It is true many such western corporations as this have officers in New York, at which most of the financial business of the companies is transacted; but this has always been felt to be a grievance by the people of the West, whose business the road does, and by the income of which it can live; and where such a company comes under the control of a court by reason of its insolvency, and a receiver is appointed to take charge of it, such control as the court can exercise over the operations of the road, and in collecting and disbursing its receipts, can be most safely and wisely exercised, and more strictly, under the eye of the court, by an officer residing within its jurisdiction. I think, therefore, on general principles, and on the facts of this case, there was no necessity for a receiver in the city of New York. I am of the opinion that the receivership in New York should be abolished in the interest of economy. Its expenses are unnecessary, and, as administered, excessive."

But the controlling consideration with the court in this case was that the receivers had become antagonistic, so that they represented two hostile camps, each bent upon securing the whole or the larger share of the spoils. It therefore became the duty of

[1] Meier *v.* Kansas Pacific Ry. Co. U. S. Legal News (Oct. 26, 1878), p. 41; 6 Circuit Court, Dist. of Kansas, Chicago Reporter, 642.

the court to see that its powers are exercised on principles of strict neutrality as regards the belligerents, and this could only be done by removing the representatives of the hostile interests, and appointing an impartial receiver in their place.

VI. *Compensation and Account of Receiver.*

527. The question of the compensation to be allowed a receiver is one that properly belongs to the master to whom his accounts are referred, and not to the court; but, of course, is determined by the court when its decision is desired or rendered necessary. Want of foresight in the receiver of a railroad in regard to the future developments of business is no reason for denying him compensation, or reducing the amount of it, when the trust has been administered with reasonable success, and with integrity and good faith.[1]

When the accounts of a receiver have been referred to a master for examination and report, no exceptions to the report will be considered by the court unless they have first been made before the master.[2] This is required in justice both to the master and to the receiver. To the master, that he may have an opportunity to reconsider his decision; to the receiver, that he may sustain his account, if he can, by additional evidence, or make such explanation as the case may require. This rule would not deter the court from directing an account to be reformed, which contains manifest errors or plainly improper charges; but such errors or improper charges ought to be clearly shown to exist, and their character as such ought to be evinced by the proofs in the case, or by their intrinsic nature.[3]

A receiver is as much an officer of court as a master is, and when under an order of court he states his own account, and submits it to the master, the latter acts in place of the court in a judicial rather than a ministerial capacity. Strictly speaking, exceptions to his report in such cases do not properly lie, as they do to an account stated by himself, as for instance when he states the account of trustees or partners. Nevertheless, if the master adopt any erroneous principle in allowing a receiver's account, the court, on petition of the proper parties, will refer the matter back to him

[1] Cowdrey *v.* Railroad Co. 1 Woods, 331.

[2] Cowdrey *v.* Railroad Co. *supra.*

[3] Per Mr. Justice Bradley, in Cowdrey *v.* Railroad Co. *supra.*

for correction. The duty of the court, therefore, consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail, or the evidence on which those items are severally founded, — the latter duty belonging more especially to the province of the master acting in his judicial capacity, analogous to the province and duty of a jury on questions of fact.[1]

528. **The amount of compensation** allowed to a receiver is graduated somewhat by his duties, and somewhat by the responsibilities of the situation.[2] In ordinary receiverships of moderate amount, five per cent. on the receipts and disbursements has been allowed; but where the amounts received and disbursed are large, as is usually the case where the property is a railroad, it is not the practice to allow a percentage, but to fix the compensation in some other manner. The receiver of a railroad is a manager as well as a receiver; and the business of a railroad is one of the most difficult and responsible duties that a receiver is charged with. The peculiar duties, responsibilities, and accountability of a receiver entitle him to a larger amount than would be demanded by the president or head officer of the same railroad. In the matter of the receivership of the Galveston Railroad Company, Mr. Justice Bradley allowed the receiver the sum of $10,000 per annum in coin, although the previous salaries given by the company to the president of the road had not exceeded $5,000.[3]

529. **A receiver's expenses for counsel and witness fees, incurred in resisting a motion for his removal,** were allowed as a charge against the trust fund, in a case where it appeared that he had acted in good faith and with integrity of purpose, although it also appeared that there were apparent grounds for the motion.[4] The receiver's accounts in this case had been referred to two different masters, who found such confusion and vagueness in them that no satisfactory conclusion could be formed as to the condition

[1] Cowdrey *v.* Railroad Co. 1 Woods, 331, per Bradley, J.

[2] Bank Comm'rs *v.* Franklin Inst. for Savings, 11 R. I. 557; McArthur *v.* Montclair Ry. Co. 27 N. J. Eq. 77; Jones *v.* Keen, 115 Mass. 170; Corey *v.* Long, 12 Abb. (N. Y.) Pr. N. S. 427.

[3] Cowdrey *v.* Railroad Co. 1 Woods, 331.

[4] Cowdrey *v.* Railroad Co. *supra.*

of the trust, or as to the state of accounts with another railroad company. After repeated complaints one of the masters refused to pass the receiver's account until they were rendered in a form calculated to give the information desired. After this was done a more satisfactory exhibit was made, but this was after the application for removal had been made. "I cannot say that the demands of the defendants for a more specific statement of the accounts were unreasonable; nor that the difficulties which were experienced in getting at an explanation of the various items were not calculated, in connection with other things, to raise suspicion as to the faithful management of the receivership. I think that these circumstances are sufficient to exonerate the defendants from the burden of paying the costs and expenses incurred by the receiver. Are they sufficient to cast the burden on the receiver himself? If the receiver acted in good faith, and was ever ready, as far as he was able, to make any explanations that were personally required, but was unskilful in the manner of keeping his accounts, he ought not for that cause to be visited with a penalty. It is not every good business man, or engineer, or superintendent, that understands book-keeping. It requires a peculiar aptitude to state and keep accounts with clearness and accuracy, especially where the transactions are varied, extensive, and complicated. I should not feel disposed, therefore, to cast the burden of the expenses referred to on the receiver personally, unless satisfied that his method of keeping his accounts was adopted for the purpose of producing confusion and covering up the nature of his transactions. I do not see any sufficient evidence that this was the case. On the contrary, it seems to have been the endeavor of the receiver to keep regular books and a constant record of his transactions; and for this purpose employed competent clerical assistance. But the intrinsic difficulties of the case may well afford some excuse for a defective exhibition of all the aspects of the various receipts and expenditures. If I were satisfied that the receiver was unfaithful to his trust, and did not, according to the best of his ability and understanding, perform the duties thereof, I should feel that I ought to cast the burden of these expenses on him; for that would have furnished good ground for his removal. But I cannot say, from anything which has been developed in the case, that he has not acted with entire integrity of purpose." [1]

[1] Per Mr. Justice Bradley, in Cowdrey *v.* Railroad Co. *supra.*

A receiver of a railroad was not allowed to charge in his account payments for advertising the accommodations of the road, when the advertisement contained a favorable reference to a firm of which he was a member, as proper persons to facilitate the forwarding of freight, and had for its object, in whole or in part, the promotion of the interests of that firm.[1]

530. A receiver may appeal from a decree directing him to pay into court a certain sum as the balance due from him on the settlement of his accounts.[2] In taking such appeal he does not attempt to appeal from the decree of foreclosure, or from any order or decree of court, except such as relates to the settlement of his accounts. "To that extent," says Mr. Chief Justice Waite, of the Supreme Court of the United States, "he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here."

[1] Cowdrey *v.* Railroad Co. 1 Woods, 331.

[2] Hinckley *v.* Gilman, Clinton & Springfield R. R. Co. 94 U. S. 467.

CHAPTER XVII.

RECEIVERS' DEBTS AND CERTIFICATES.

I. For what purposes receivers may be authorized to incur debts and issue certificates, 533–538.

II. Priority of receivers' certificates, 539–544.

III. Negotiability of receivers' certificates, 545, 546.

I. *For what Purposes Receivers may be authorized to incur Debts and issue Certificates.*

In the enforcement of railroad mortgages there is frequent occasion to invoke the aid of courts of equity to take possession of the property for its preservation. As shown in the preceding chapters, this is done through the agency of receivers. It may be necessary for receivers, in the proper management of the property, to use money beyond the current income of it; and it is usual for the courts to authorize receivers, for specific purposes, to negotiate loans upon the credit of the property. This authority of the courts, when properly exercised, is highly beneficial to the mortgage bondholders. What are the proper occasions for the exercise of this power is the first subject for consideration.

533. **General principles.** — Under the common law rules a mortgagee in possession has authority to make necessary and reasonable repairs, and to protect the title from other incumbrances. He has, however, no right to make the estate better by expenditures for convenience or ornament. He has no right to lay out money in ways not essential to the preservation of the property, although he may think that the value of it will thus be increased. This would be improving a mortgagor out of his estate.[1]

This principle of the general law of mortgages governs courts and receivers in the management of railroad property, pending

[1] Sandon *v.* Hooper, 6 Beav. 246; 2 Jones on Mortg. § 1126.

litigation respecting it. A receiver is generally appointed at the instance of a mortgagee, and the receiver's possession is only a substitute for the possession of the mortgagee. As against the mortgagor, the same rules govern as to the expenditures a receiver may make and charge upon the property that govern when a mortgagee is himself in possession. A receiver has no greater right than a mortgagee to improve the mortgagor out of his estate. It does not alter the rule in this respect, that generally when the affairs of a railroad company become so embarrassed that the mortgagee is obliged to assume possession of the road, either directly or through the intervention of a receiver, in order to protect the mortgage title and interest, the company itself practically ceases to have any interest in the road, and rarely is able to redeem. The right of redemption remains until finally barred by foreclosure proceedings, and must be protected, though it be seldom or never exercised.

Complaint as to the management of railroad receivers has generally come, not from the stockholders of the corporation, because it is seldom they care to redeem, but from mortgage bondholders; and as often, perhaps, from those at whose solicitation the receiver was appointed as from others who may hold under junior mortgages, and who, therefore, have a right to redeem. The history of such management in this country shows that the bondholders chiefly interested have sometimes found themselves improved out of their interest in the property. The management of mortgage trustees in possession has sometimes been open to the same criticism; but in such case the remedy is more completely in the hands of the bondholders themselves.[1]

The power, therefore, of a Court of Chancery to authorize a receiver to create liens upon a railroad should, upon principle, be limited to cases in which the creation of such liens is indispensable to the preservation of the property pending litigation.[2] The

[1] Judge Baxter is reported to have expressed himself strongly, in a recent case before the Circuit Court of the United States, against the practice of placing railroads in the hands of receivers. He cited the case of a railroad in Georgia which cost $15,000,000. The receiver, who was in charge for three years, issued certificates to the value of $1,500,000, and when the road was sold the proceeds were not sufficient to pay the certificates. In another case, in Detroit, a road cost over $8,000,000. When the road came to be sold, eminent counsel requested the judge to fix the minimum price for the sale, suggesting that such price should be a sum sufficient to cover the charges of the receiver and his counsel. 11 Chicago Legal News, 8.

[2] Meyer *v.* Johnston, 53 Ala. 237.

nature of railroad property is such, however, that a liberal construction must be given to the power to authorize repairs; for a railroad already in operation must be kept in operation, so that it may be sold as a going concern, else the property itself would seriously deteriorate in value, and its business would be lost. In analogy to the right of a mortgagee in possession to supply things necessary to put a house upon the estate in a condition to be rented, or to be occupied, the receiver of a railroad may supply it with rolling stock, or with other things essential to the operating of the road.

534. For what purposes a receiver may be authorized to borrow money and create liens therefor upon the property in his charge. — The legitimate object of a court of equity in the assumption of the management of a railroad being the preservation of the property, and the enforcement of the right of creditors and others interested in it, the power of the court over the property should be limited to preserving the property as it is, and there is no principle of law or of public policy which will justify a court in engaging in the completion of unfinished roads, and in authorizing the expenditure of large sums of money for this purpose, except with the consent of the mortgage creditors whose interests may be thereby affected. Such a course is open to the objections that the liens of mortgage creditors are thus, without their consent, displaced by new liens; and that, in engaging in such new undertakings, the court lays aside its judicial character and functions. The whole power of the court, when exercised to its fullest extent, is confined to making necessary repairs and protecting the property as it is. The nature of the property being such that, to prevent serious injury and depreciation in value, the road must be continued in operation and sold as a going concern, the court may continue the running of trains and the usual business of the road. For the economical conservation of the property in this way, the court may, perhaps, under some circumstances, authorize expenditures for rolling stock, and for other things essential to the operation of the road; and, if the income of the road is insufficient for such purpose, may provide the requisite means by creating charges upon the property.[1]

This equitable power may be exercised not only when a receiver

[1] Meyer *v.* Johnston, 53 Ala. 237, 346, and cases cited.

has been appointed upon the application of a mortgagee, but also when the appointment has been made under proceedings in insolvency instituted against a railroad company. There can be no doubt of the duty of the court in such case to order the receiver to keep the road in repair, so that it may be operated with safety to the public, and without impairing the value of the trust estate; and it may be the duty of the court to provide the means of making such repairs by a pledge of the property. The power of the court to act in such case does not depend upon the statute, but upon the general equity jurisdiction of the court.[1]

535. To preserve the road as a whole, and to prevent loss or depreciation, it may be necessary to rebuild, or even to build anew, in considerable portions of it. Thus, where it was necessary to complete a road before a certain date, in order to secure a land grant, which was a very material part of the security of the bondholders, Judge Dillon authorized a receiver to borrow money, and complete the road within the time limited. The exigency of the case demanded an unusual exercise of power for the preservation of the security.[2] "It is manifest," said Judge Dillon, "that unless a receiver is appointed, no further work will be done on the extension lines, and that the land grant, which is the only security of any considerable value which the plaintiffs and the other bondholders have for their large advances, will lapse and be wholly lost. In order to save this land grant, the road must be completed by December third ensuing, and it seems to me that the exigencies of the case are such as, under the circumstances, to warrant the court, upon the application of the parties chiefly interested, to appoint a receiver and clothe him with the authority desired." Both the opinion of the court and the order made show the urgent necessity of appointing a receiver for the protection and preservation of the security.

[1] Hoover *v.* Montclair & Greenwood Lake Ry. Co. 29 N. J. Eq. 4.

[2] Kennedy *v.* St. Paul & Pacific R. R. Co. 2 Dill. 448. In this case a sum not exceeding $5,000,000 was authorized. See note to this case for form of the order of court, and form of certificate authorized to be given for the money borrowed. The order is most carefully drawn. Among other things it explicitly states that "the main effect of this order is to insure the completion of said roads by the third day of December next, and the receiver is instructed so to act, under the limitations aforesaid, as to see that this object shall be accomplished, and to proceed at once, and with expedition." 2 Dill. 454.

The Supreme Court of the United States in a recent case approved of receivers' certificates issued for the completion of a canal, in aid of which the United States had made a large grant of land conditioned upon the completion of the canal within a fixed time.[1] "Hence there was a necessity for making the order which the court made, — a necessity attending the administration of the trust which the court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors."[2]

In a case before the Supreme Court of Iowa it appeared that the receiver had been authorized to complete and build all the unconstructed portions of the railroad in his hands, from Clinton to Iowa City, in that state, and to that end to borrow such sums of money as might be necessary, not exceeding eight thousand dollars per mile upon the whole line of road, completed and to be completed, and to make the same a first lien upon the property. The propriety of constructing portions of the road was not, however, a question before the court.[3]

Mr. Justice Bradley appointed receivers, pending a foreclosure suit, of a railroad which had been built so far as to enable trains to run over the road, but a portion of which had been built in a hasty and temporary manner, and needed to be completed in a substantial way in order to insure the safety of the trains; and authorized them to put the road in repair, and to complete any incomplete portion of it, to procure rolling stock, machinery, and other things necessary for operating the road to the best advantage, and save and preserve it for the benefit of the mortgage bondholders. They were authorized to borrow money for these purposes, and make the payment of it a first lien upon the property. The order for the borrowing of this money was asked for by the mortgagees themselves; and consequently they were precluded from objecting to the effect of what they had asked for and consented to.[4]

The necessity of the expenditure for the protection of the property is the criterion of its propriety. Thus, the Circuit Court of the United States, after an appeal of the principal cause to the Supreme Court of the United States, refused to authorize a re-

[1] Jerome *v.* McCarter, 94 U. S. 734, 738.

[2] Per Strong, J., in Jerome *v.* McCarter, *supra*.

[3] Bank of Montreal *v.* Chicago, Clinton & Western R. R. 7 Cent. L. J. 267.

[4] Stanton *v.* Ala. & Chattanooga R. R. Co. 2 Woods, 506.

ceiver in possession of the property to make any radical change in the condition of the railroad property, such as purchasing a bridge across Galveston Bay, or building or contracting to use a new junction road through the city of Houston.[1]

536. The case of the Vermont and Canada Railroad Company *v.* The Vermont Central Railroad Company,[2] which will be noticed more fully in the next chapter, is a very instructive one in relation to the proper functions of a Court of Chancery in the management of a railroad through a receiver, and the creation through him of liens which shall override previously existing mortgages. Mr. Justice Barrett, upon these points, said: "It is fundamental that, in a receivership involving and requiring the carrying on of a business, in order to meet the exigency which caused the necessity for it, and made it the duty of the court to create and maintain it, such receivership should not go outside of the subject and purpose of it, and what is necessarily incidental thereto. Rent in arrear, to be paid by the earnings of the two roads, run as one, was the purpose of the receivership of 1861; and those roads, with fixtures and equipments, were the property in the hands of the receivers, to be used by them in making the contemplated earnings. Of course, while thus in their hands, the property was to be used and treated upon the same considerations as would properly have been entertained and acted on by the owners, using it for the same purpose, namely, legitimate earnings. This would involve the condition of the track, the depot accommodations, the equipments for service, the force of help to be employed, and the relation to and connection with other roads, as affecting the business and earnings of the road in hand. While the current use of the property looked especially to the realizing of net income, the property itself has not, for that reason, to be subjected to deterioration and waste; but it should be kept

[1] Cowdrey *v.* Railroad Co. 1 Woods, 331.

[2] Supreme Court of Vt. Oct. 30, 1877, 14 Am. Railw. Rep. 497, 546, 552. But it does not follow that a long continued receivership is not sometimes necessary. "The theory is that our possession is only temporary," remarked Judge Drummond, in a recent case in the Seventh Circuit, "but there is generally such a multitude of claims to be adjudged in each case, and so great are the difficulties in arranging conflicting rights among the mortgagees preparatory to a sale and reorganization that it sometimes happens, in spite of the earnest efforts of the court to hasten the sale by foreclosure, that they remain in the custody of the court for some years." Secor *v.* Toledo, Peoria & Warsaw Ry. Co. 7 Biss. 513.

in proper condition, not only for doing the current business during the receivership, but for continuing to do it, without the necessity for special and extraordinary outlay on passing back to the possession and use of the owners. But, for any legitimate purpose, the receivership could not be extended to the control and maintaining and repairing and equipping other roads, or to the building or buying of other roads, or to the control and operating of lines of steamboats, or steamboats in the line of other roads, even with the view of larger earnings, and larger net income of the property which is the subject of the receivership. . . . . It is fundamental in the law that a receivership is temporary, — to serve an existing exigency of a temporary nature; and, when that is done, it is to cease. The idea that a court, in virtue of its prerogative in that behalf, is to take upon itself the office of instituting a receivership to be perpetual, and to do the duty of a court in controlling, directing, and enforcing the administration in the management of a business, for the profit and emolument of the parties interested, and not to serve a present exigency, rendering it necessary in order to prevent a failure of legal justice and right, has not yet been propounded in any book on the subject, nor entertained and acted upon in any case."

537. When it is necessary for the receiver to raise money for the purpose of repairing or operating a railroad, the court may authorize him to issue negotiable certificates of indebtedness, which shall constitute a first lien upon the property or the proceeds of it, and shall be redeemable within a limited time, or when the property is sold by the court. The issuing of such certificates is a matter of hardly less importance than the appointment of receivers, and should not be authorized except after full notice to the parties interested, and ample opportunity for them to be heard. The receiver should make a detailed statement of the sums needed, and the purposes for which they are needed, and clear proof should be adduced of the correctness of this statement, and of the necessity of raising the money. Such certificates are not debts of the company, but of the receivers, backed by the pledged faith of the court that the property on which they are made a charge is in the possession of the court, and that it will provide for the payment of such certificates before the property or the proceeds of it shall pass out of its con-

trol. They should, therefore, be issued with the utmost circumspection, and never in excess of the urgent present need.[1]

538. Such certificates may be issued for material furnished or for labor performed, as well as for money borrowed, provided they are issued for an adequate consideration received. The receivers of the New Jersey Midland Railway Company, upon their appointment, found in the possession of the company several locomotive engines and tenders, held under a lease from the makers, which provided that, upon the payment in full of all the rent reserved, the property should belong to the railway company. The receivers requested the owners of the engines and tenders to leave them in their possession for the use of the road, promising to apply to the court for authority to pay the rent due under the lease, and on the faith of this promise the owners permitted the property to remain in their hands. The receivers afterwards obtained authority to issue certain certificates of indebtedness, to be used for the purposes of their trust, among which was the payment of the rent which had become due upon the engines.

The receivers offered to deliver certificates so obtained in payment for the rent, and the offer was accepted. They were, however, notified by persons interested in the mortgage bonds of the road not to deliver the certificates, because the property was not worth the amount agreed to be paid for it, and the receivers accordingly refused to deliver the certificates. An application was made by the owners of the engines to compel the receivers to deliver the certificates to them, but the chancellor held that the receivers were not bound to deliver the certificates in payment of particular items of expense, the propriety of the payment of which was not before the court; but they were authorized by the court to purchase the locomotives and tenders at their true value, and to pay for them in the certificates; otherwise the owners of this rolling stock, having the power at any time to take the property, might do so, and they should be allowed just compensation for the use of it since it had been in the hands of the receivers.[3]

[1] Meyer *v.* Johnston, 53 Ala. 237, 346; Hoover *v.* Montclair & Greenwood Lake Ry. Co. 29 N. J. Eq. 4. The order authorizing the certificates in the latter case declared them to be a debt incurred for the benefit and protection of the property, and to be the first lien upon it, and on the net receipts, rents, income, and profits of the railroad; the net receipts, &c., to be applied to the payment thereof before recourse is had to the property itself.

[3] Coe *v.* N. J. Midland Ry. Co. 27 N. J. Eq. 37.

II. *Priority of Receivers' Certificates.*

539. The question of the priority of receivers' certificates and loans over existing mortgage liens has not very often been a matter of litigation; because in almost all instances in which the courts have authorized receivers to borrow money and make their obligations a first lien upon the property, the mortgagees have themselves asked for the orders for these purposes in advance,[1] or have expressly assented to the making of them, and, of course, they are in such cases precluded from afterwards claiming any priority over the lien thus created for the purpose of preserving the mortgaged property. But it is claimed that courts of equity have authority, without the consent of mortgagees, to order receivers to borrow money, and to bind the property in their hands for the payment of the loans. This authority, if it exists at all, is not, however, altogether discretionary; the judicial discretion is limited by settled principles of equity.[2] Aside from any consideration of the mortgagor and others having the right to redeem, against whom a Court of Equity has power analogous to that of a mortgagee in possession to incur charges for the preservation and repair of the property it has taken possession of through its receiver, a Court of Chancery has no power to impair the obligation of a mortgage contract, by creating a superior lien without the mortgagee's consent, unless it be in the exercise of a like equitable power of preserving and protecting the property. The law does not permit the obligation of contracts to be impaired. "The Constitution of the United States inhibits even a state from doing an act which shall have that effect. And, certainly, a court, which is a portion of the government of the state, cannot have a power which is denied to the state in convention assembled. If, therefore, the action of a chancellor in this cause goes to the extent of taking the property of the defendant corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end of raising money, by charging the railroad and its appur-

[1] As in Kennedy *v.* St. Paul & Pacific R. R. Co. *supra*; Stanton *v.* Ala. & Chattanooga R. R. Co. *supra*; Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. *supra*; and Hoover *v.* Montchair & Greenwood Lake Ry. Co. *supra*.

[2] Meyer *v.* Johnston, 53 Ala. 237.

tenances with liens which are to supersede older ones, without the consent of the holders of these, he has inadvertently passed beyond the boundaries of a chancellor's jurisdiction. In our opinion, no such power is vested or resides in any judicial tribunal."[1]

The question of the priority of receivers' certificates may arise with reference to three classes of creditors: first, with reference to the bondholders secured by the mortgage for the enforcement of which the receiver was appointed; second, with reference to prior mortgagees; and, third, with reference to subsequent mortgagees. Owners of the equity of redemption stand in the same legal relation to such certificates as subsequent mortgagees, since they have the same right of redemption.

540. When bondholders, or trustees in their behalf, after obtaining the appointment of receivers, have petitioned that they might be allowed to borrow money on the credit of the property, there can be no question that they waive the priority secured to them by their mortgage in favor of such debts. Even when their waiver is not expressly made, it is implied under such circumstances. Moreover, even if such petition be not made by or in behalf of such bondholders, but by the receiver himself, or by any other creditors, if the bondholders or mortgage trustees, being parties to the proceedings and before the court, make no objection to the creating of such debts and liens upon the property by the receivers, they cannot afterwards object to according priority to the liens so created.[2]

541. Upon the question of the power of courts to give receivers' loans precedence over existing mortgages there are no satisfactory adjudications. It is claimed on the one hand that this power is confined to cases in which the prior mortgagees, either expressly or impliedly, consent to the making of such loans; and that to attempt this without such consent would be an invasion of the right of property by the tribunals whose duty it is to protect this fundamental right. But, on the other hand, it is claimed that where it is necessary to raise money, not to extend or improve an existing road, but to repair and preserve a road which the court has taken custody of at the suit of a junior mort-

[1] Per Manning, J., in Meyer *v.* Johnston, *supra.*

[2] See §§ 539, 543.

gagee, it would be competent for the court to authorize the raising of money by loans upon the credit of the entire property, making them a lien upon it in preference to the senior mortgages. Otherwise, it is said, it might be practically impossible for the court to give any protection to a junior mortgagee. The property might be amply sufficient to meet a prior mortgage in any event, so that the bondholders under it might be opposed to any expenditure upon the property, even to keep it in repair and in operation, when such expenditure might involve the raising of money, by creating liens therefor which should override their mortgage; while it might be evident that, by judiciously repairing and operating the road, the property might finally be disposed of at a price sufficient to pay not only the first mortgage, but as well the junior mortgage. Moreover, after the court has once taken the property into its custody, it would be its duty, in behalf of all the parties in interest, to take care of it, and not allow it to go to decay; and, if this cannot be done out of the income of the property, it would seem to follow that it would then be the duty of the court to authorize, for this purpose, the raising of money upon the credit of the property itself.

Such was the course adopted by the Supreme Court of Alabama in the recent important case of *Meyer* v. *Johnston*.[1] A receiver having been appointed upon the application of a junior mortgagee, the court approved his issuing of first lien certificates of indebtedness, under the chancellor's direction, in opposition to the will of prior lien-holders. In addition to the duty of the court to preserve the property in its custody, the public nature of railroads was considered. "If it were not for the public quality belonging to them, for the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, a chancellor might say to the parties most interested, Unless you furnish means for the protection of this property, which does not itself afford an adequate income for the purpose, it may become a dilapidated and useless wreck. But the inconvenience and loss which this would inflict on the population of large districts, coupled with the benefit to parties who, perhaps, are powerless to take care of themselves, of preventing the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require — not for the

[1] 53 Ala. 237, 346.

completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one, but to keep it up, to conserve it as railroad property, if the court has been obliged to take possession of it — that the court should borrow money for that purpose, if it cannot otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued, constituting a first lien on the proceeds of the property, and redeemable when it is sold or disposed of by the court."

542. The principle is clear that a mortgage cannot be displaced or postponed without the consent of the mortgagee. — The court cannot, by authorizing a receiver to create liens upon the property, displace or impair the mortgagee's rights of property, any more than the legislature can impair the obligation of a contract. The court has power while in possession of property to protect it from loss and destruction, and to preserve it in the condition in which it was received; and for this purpose it may authorize the expenditure from the property itself of whatever is absolutely necessary for its preservation; and may do this as against any and all parties interested. The extent of this power is measured by the absolute necessity of the expenditure for the protection of the property of which the court has taken charge. This expenditure is a matter of duty with the court, and not a matter of discretion. When the limit of such actual necessity is passed, the consent, express or implied, of those whose rights of property will be affected, must be had. If large expenditures are to be made to put a railroad into condition to be operated by a receiver, if a new road is to be built, or a part of the existing road is to be rebuilt, or if new rolling stock is to be purchased for it, the debts incurred for these purposes should have the sanction of the mortgagees of the property. If such mortgagees are not parties to the suit in which the receiver was appointed, they should be summoned in before the granting of any petition to charge the property with such debts.[1] When prior mortgagees do not assent to receivers' liens, these should be made expressly subject to the prior mortgages.[2]

[1] See Regent's Canal Iron Works Co. *in re*, L. R. 3 Ch. D. 411; stated in § 552; and see article 13 Am. Law Rev. 40, October, 1878, on "Postponing Priorities of First Mortgage Liens," by Judge Clayton.

[2] As was done *In re* U. S. Rolling Stock Co. 55 How. (N. Y.) Pr. 286.

543. **Neither the mortgagor nor his assignees can question the priority of receivers' certificates.** — In a recent case before the Supreme Court of the United States,[1] it appeared that the Lake Superior Ship Canal, Railroad, and Iron Company, after executing two mortgages of its property, including a large land grant from the United States, made default in the payment of interest, and a receiver was appointed. The receiver, in order to obtain money necessary for completing the canal, and to save the land grant, obtained an order of court authorizing him to create and sell certificates of indebtedness to the amount of $500,000, secured by a mortgage of all the property, which was to be prior in right to all other mortgages. The creditors secured by the existing mortgages appear not to have asked for this order, but they were all there in court and did not object to it. The company afterwards having gone into bankruptcy, the assignees were made parties to the foreclosure suit, and objected to the priority accorded by the decree of foreclosure to the certificates issued by the receiver. But the court held that neither the mortgagor nor his assignee in bankruptcy could object to the order in which the priority of valid and subsisting liens on the premises is fixed by the decree. It could make no difference to them whether the certificates are paid before other liens are discharged, or after all the debts secured by mortgage have been satisfied. The assignees can take nothing until all liens on the assigned property have been removed. "It would be superfluous," said Mr. Justice Strong, delivering the judgment of the court, "to spend much time in considering the power of the court to confer the authority upon its receiver that it attempted to confer. As a Court of Equity, having the mortgaged property in charge, it was its plain duty to preserve it, not only for the benefit of the lien creditors, but also for the benefit of the company whose possession the court had displaced. Under the provisions of the acts of Congress, granting the lands covered by the mortgages, the lands reverted to the United States, unless the ship canal should be finished within a fixed period, and that period was passing away when the order was granted to the receiver to raise money for completing the canal, by the issue of certificates secured by his mortgage. The canal was unfinished, and there were in the receiver's hands no funds to finish it. Hence, there was a neces-

[1] Jerome v. McCarter, 94 U. S. 734.

sity for making the order which the court made, — a necessity attending the administration of the trust the court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors; whether the action of the court could make the receiver's mortgage superior in right to the mortgages which existed when it was made, it is hopeless to inquire. None of the creditors secured by those other mortgages objected to the order when it was made, though they were all then in court. None of them object to its lien or its priority now. And we think the appellants, either as representatives of their assignors or of general creditors, cannot be heard to object. Beyond doubt, they would not be entitled to a return of the property discharged from liability for the receiver's certificates remaining unpaid, even if all the other mortgages were satisfied. As against them the certificates are certainly charges upon the property, and they have, therefore, no right to complain of the decree, which gives the certificates priority to other liens."

544. Provision is made by statute in a few states that receivers may be authorized to borrow money and create liens upon the property. Thus in Vermont [1] it is provided that the Court of Chancery shall have power to authorize the receivers or managers of property in the course of administration in such court, when the interest of the parties or property shall require it, to borrow money as it may be needful for the proper and convenient discharge of their duties, at a rate not exceeding eight per cent., and on such other terms, conditions, limitations, and security as shall to the court seem fit. But it is provided that nothing contained in this act shall be construed to prevent such receivers or managers from borrowing money for temporary purposes in the same manner they could before the passage of this act.

In New Jersey [2] the receiver of an insolvent railroad company is empowered to operate the road for the use of the public, and all expenses incident to the operation of such road are declared to be a first lien on the receipts, to be paid before any other incumbrance whatever.

In Ohio [3] it is provided that the earnings of a railroad in the

[1] Gen. Stat. 1870, p. 924; Acts 1866, No. 41, page 53.

[2] 1 R. S. 1877, p. 196, § 106; Laws 1874, p. 11.

[3] Laws 1872, p. 31, §§ 1, 3, 4.

hands of a receiver, and all other moneys coming into his hands as such receiver, shall be applied first to pay costs and expenses of the suit in which he was appointed, and the expenses of operating and managing the road, including all materials and supplies procured by him therefor, and also liabilities incurred by him in such operation and management; and that all judgments recovered against the receiver of a railroad for injuries to person or property, or for wages of employees, or work done, or materials furnished while such receiver is operating or managing such railroad, shall be a lien on the funds in his hands as receiver, but shall affect him only in his trust capacity, and not individually.

When the line of railroad operated by a receiver lies wholly within the State of Ohio, all moneys coming into the hands of the receiver, whether arising from the operating of the road or otherwise, shall be kept and deposited in such place within this state as the court may direct, until properly disbursed; but if any portion of said railroad shall lie in another state or states, then said receiver shall be required to deposit in this state at least such share of the funds in his hands as is proportioned to the value of the property of said road within the limits of Ohio.

II. *Negotiability of Receivers' Certificates.*

545. Such certificates, however, are not commercial paper, good in the hands of a *bonâ fide* holder, without regard to any irregularity or infirmity attending their original issue. They must be governed according to the authority conferred upon the receiver to issue them, and not according to the form which he may choose to give them. Where receivers were authorized to dispose of such certificates, payable ten years after date, for not less than ninety cents on the dollar of their par value, and at a rate of interest not exceeding eight per cent. per annum, and they hypothecated them at an exorbitant rate of interest, and received only a third, or, at most, half of the par value of the certificates, it was held that the certificates were good in the hands of the holders of them for the amount of money actually advanced upon them, with interest according to the terms of the order of the court under which they were issued; but that the lenders of the money were not bound to see that the money was applied to the purposes of the trust. The money they have actually advanced cannot be confiscated, because the officers appointed by the court

have been unfaithful to their trust.[1] The certificates in this case were made payable to bearer, but on their face they recited that they were made in pursuance of an order of Judge Bradley, on the twenty-sixth day of August, 1872, in a suit in equity pending in the Circuit Court of the United States at Mobile for the District of Alabama, in the Fifth Judicial Circuit, between parties named. The evidence showed that the money was advanced upon the notes of the receivers, the certificates being pledged as collateral, with power to sell them at public or private sale without notice. But the court held that the lenders of money on the hypothecated certificates might be compelled to allow their money to go on the terms prescribed by the orders of the court, both as to the rate of interest and the time of payment, and ordered that the certificates not necessary at ninety cents on the dollar, to secure the sums so advanced, should be returned to the receivers.

546. Certificates issued without consideration are invalid even in the hands of an innocent holder for value. Under a contract for the purchase of iron rails, a receiver issued certificates therefor, which recited the order of court, and were made payable to bearer. The rails were never delivered or tendered to the receiver, but the certificates were transferred to an innocent holder for value. In a suit by him it was adjudged that he could not recover; that the receiver had no powers except those derived from the order of court authorizing the issuing of the certificates, and therefore could issue certificates only "for money borrowed, material furnished, labor performed, or on account of contracts made by him for or on account of the construction or completion of said road or any part thereof."[2] In the language of the court, "When the material was furnished or labor performed he was authorized to issue the certificates in payment therefor, and not until then. And if he made a contract for the construction of the road he might issue certificates as the material was furnished or the labor performed, and on the completion of the road he could issue his certificates in final payment. But the power is not conferred to issue certificates in payment for material not furnished or labor not performed. On the contrary, we are of the opinion

[1] Stanton *v.* Alabama & Chattanooga R. R. Co. 2 Woods, 506.

[2] Bank of Montreal *v.* Chicago, Clinton & Western R. R. Co., Supreme Court of Iowa, June Term, 1878, 7 Cent. L. J. 267; 6 Reporter, 616.

it fairly appears he was prohibited from so doing. If the necessity existed for enlarged powers, they should have been applied for." Moreover the certificates referred on their face to the order of court under which they were issued, and the holder was bound to take notice of the limitation of the receiver's power, and bound to know whether the certificates in question were issued in accordance with the power conferred.

CHAPTER XVIII.

DEBTS OF MORTGAGE TRUSTEES IN POSSESSION.

I. Right of trustees to repayment of their debts and expenses out of the trust fund, 547–555.

II. Liability of trustees operating a railroad as common carriers, 556.

I. *Right of Trustees to Repayment of their Debts and Expenses out of the Trust Fund.*

547. Trustees under railroad mortgages have an inherent equitable right to be reimbursed all expenses reasonably incurred in the execution of the trust, and for such expenses they have a lien upon the trust property.[1] Their rights go even farther than this; for, if the trust property prove insufficient to reimburse the trustees for their proper expenses and reasonable compensation, they may call upon the bondholders in whose behalf the trust was created to pay them. It is immaterial that the deed of trust makes no provision for the payment of such expenses and charges; this is a legal right, which necessarily attends the administration of the trust. The franchise and property conveyed to the trustees become charged with a lien in their favor, and they remain so charged until the trustees themselves do something that operates as a discharge of such lien. If, after long litigation by the trustees to establish the mortgage lien, and to enforce it by foreclosure, subsequent mortgagees buy up the bonds secured by the mortgage, and form a new corporation, instead of redeeming the first mortgage by paying the amount fixed by the decree of foreclosure, the right of the trustees to hold all the lien originally existing in them for their services and expenses in administering the trust is nowise affected. Decree of foreclosure, in such case, would have full effect upon the title, as between mortgagor and mortgagee; and, although all the bondholders have been satisfied,

[1] Rensselaer & Saratoga R. R. Co. *v.* Miller, 47 Vt. 146; Morison *v.* Morison, 7 De G., M. & G. 214.

the legal title is in the trustees; and if the new corporation, or the subsequent mortgagees, would prevent the trustees asserting their title, and entering into possession, they must satisfy the proper claims they have upon the property. Their lien upon the property extends not merely to claims for their own services, and for payments actually made by them, but to advances made to them by bondholders to supply them with funds in the course of the administration of the trust; for such advances are, in effect, loans to the trustees for the benefit of the trust.[1]

548. When the object of a receivership has been accomplished, and the occasion for it no longer exists, but it is nevertheless continued, in form and name, by consent of the parties in interest, the managing party is not regarded as a receiver in the sense of the law, but as having the character and office of an administrator of a trust, by agreement of the parties. Consequently, the debts contracted by such manager, although having the formal sanction of the court, cannot be established as receivership liens, but are debts which are a lien upon the trust property, under the common doctrine that disbursements and expenses, properly made and incurred by trustees, on account of the trust property, are entitled to payment out of the trust property. A decree entered by consent, after the occasion for the receivership has ceased, for a new and continuing system of tenure and management, does not make the manager the officer and representative of he court, but merely the agent and representative of the parties.

549. These points are forcibly illustrated by the case of the Vermont Central Railroad Company.[2] — In the year 1849, the Vermont and Canada Railroad Company leased to the Vermont Central Railroad Company its road and all its property, to hold under a perpetual lease, reserving as rent eight per cent. upon the cost of its road and property, payable semi-annually. In the following year an addition was made to the lease, providing that, after four months' default in payment of the rent, the Vermont and Canada Railroad Company might take possession of both roads, and all the property of both, and run them till, out

[1] Rensselaer & Saratoga R. R. Co. *v.* Miller, *supra*.

[2] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co., decided Oct. 30, 1877, 50 Vt. 500; reported in 14 Am. Ry. Rep. 497–575.

of the net income, the accrued rent should be paid; and then possession should be surrendered to and resumed by the Vermont Central Railroad Company, and held and used under the original lease. In 1851, the Vermont Central Railroad Company executed a first mortgage of its road, and on the twentieth day of May, in the following year, a second mortgage; but both mortgages were made expressly subject to the rights of the Vermont and Canada Railroad Company under the lease. On the twenty-eighth day of the following June, the Vermont Central Railroad surrendered to the first mortgage trustees, who then took possession, and the company has never since had possession. The last payment of rent under the lease was made on the first day of June, 1854. The following year, the Vermont and Canada Railroad Company filed a bill in the Court of Chancery in Franklin County against the Vermont Central Railroad Company, and the trustees under both mortgages, and obtained the appointment of temporary receivers; and after protracted litigation the Supreme Court, in January, 1861, issued its mandate to the Court of Chancery, directing that the receivers then in possession, or such as the court might see fit to appoint, should continue in the possession and management of the roads, and secure the tolls and income thereof, and cause the same to be paid over in extinguishment of the rents then due, or which might become due, until the same should be fully satisfied. The Court of Chancery entered a decree accordingly, continuing the receivers in the management of the property, and directing them to pay over semi-annually, on the first days of December and June, such sums as might accrue from the earnings of the property, until the sums then due and growing due for rent should be fully paid. Under this mandate and decree the receivership was administered until 1864, when a compromise decree was entered in the Court of Chancery, by agreement of the parties. By this compromise the construction account of the Vermont and Canada Railroad Company was settled; and under the authority of an act of the legislature the back rent was converted into stock, and the capital stock was increased to $2,000,000. To carry this adjustment into effect, a decree was entered January nineteenth, 1864, declaring the capital stock of the Vermont and Canada Railroad Company to be $2,000,000, which should be the basis for the computation of the rents provided for in the original lease, to be paid by the trustees and re-

ceivers from the income of the roads, in semi-annual payments, beginning on the first day of June, 1864. The decree further provided for a board, to be chosen annually by the stockholders, to advise the trustees and receivers in respect to the management of the roads and property, and to audit the accounts. This decree was manifestly one of consent.

In 1865, upon the petition of the receivers, the court authorized them to borrow $700,000, and to pledge equipments of the road as security. This decree was apparently made with the consent of all the parties in interest. In 1867, a further equipment loan of $300,000 was authorized, and also a loan of $500,000, for the payment of interest on the first and second mortgages. In 1869, a third equipment loan was authorized of $500,000. In 1871, a loan of $1,000,000 was authorized; and in 1872, a loan of $2,500,000, part of which was to be applied to retiring the first equipment loan. The decree authorizing the latter loan provided that the notes issued under the decree should constitute a lien and charge upon the trust property under the control of the trustees and managers, and the earnings thereof.

From time to time, during the period of these decrees, there had been sundry decrees and orders, changing and appointing managers, and ratifying contracts of lease with other roads, — the Ogdensburgh and Lake Champlain Railroad Company, the Rutland Railroad Company, and the Missisquoi Railroad Company.

All these proceedings professed, and were represented to the chancellor, to be amicable, and for the most part to have been devised and agreed upon by leading parties. No one appeared in any instance with protest or objection. No one made question or objection afterwards, till adverse litigation was begun in 1873, by the Vermont and Canada Company's petitioning for an order for the payment of the overdue rent, and an order for the removal of the managers.

In the mean time, a corporation by the name of the Central Vermont Railroad Company had succeeded to the management of the property as receivers. Finally, in 1876, this company and various individuals filed a petition, setting forth that for fifteen years the Vermont and Canada and the Vermont Central Railroad Companies had been under the administration of the court in this cause by managers appointed by the court; that during such ad

ministration large sums of money had been borrowed by the managers, and bonds issued therefor under different decrees, amounting in the whole to about $4,337,000, outstanding, on which was also due about $175,000 of interest in default; that, in addition to this funded debt, there was outstanding also a floating debt of about $2,000,000; that the managers were without money and without credit; and therefore they prayed that these debts might be declared a charge and first lien upon the property of these roads, and that they might be sold, with all their equipments, for the payment of these and other debts. This petition was dismissed by the chancellor; and, on appeal to the Supreme Court of the state, his decree was affirmed. Mr. Justice Barrett delivered the opinion of the court, reviewing all the proceedings in the case from the time they were commenced in 1861, and fully examining all the legal questions involved.[1] The original receivership was undeniably proper, as it was the only practicable remedy for enforcing the security of the Vermont and Canada Company upon the earnings of the two roads for its rent, except putting this company into the possession and management of the roads; and this the court declined to do, for the reason that the management might be such as to render such possession unduly continued. It was supposed that a receivership, interested to have this claim satisfied at the earliest practicable day, so that subsequent rights and interests might be served by the property, would result in the earliest practicable enfranchisement of the property from judicial control, and the final ceasing of the suit.

In what was provided in the compromise decree, as to the possession and management of the property, the court was performing no duty, but merely accorded, *ex gratia*, assent and ratification. It exercised no judicial judgment, and did not put forth the exertion of its prerogative. It is fundamental in any idea of a receivership that the court is to have the active and responsible control of the administration. That was not so in this case; but, on the contrary, the whole course, in general and in detail, was devised and executed by the managers, and their associates and advisers in interest, without any supposition on the part of themselves or of the court that the court had any real office to perform calling into exercise judicial judgment, direction, or control. "The peti-

[1] Oct. 30, 1877. Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. 50 Vt. 500; 14 Am. Ry. Rep. 497, 559, 565, 567, 568, 570.

tion cannot be maintained then, and the prayer thereof granted," said the learned judge, "on grounds and reasons and rules of the law peculiar to a receivership, as it is understood and provided for and warranted by the law. If it were to be assumed that the trust debts, as they are called, including what is called the floating debt, would be a first lien on all the property, if incurred in the administration of a proper receivership, and that it would be the province and duty of the court to order the sale of the property, as the only means of giving effect to that lien, in rightful satisfaction of such debts, it would not follow that such is true in the case as it is before us. . . . . In the other cases of receiverships, where allowances were upheld, the expenditures and services were in receiverships of necessity, and where the expenditures and services were in the administration of the office, under the active and affirmative direction of the court. The other citations point to the common doctrine of the lien of trustees for the proper expenses and disbursements of administering the trust.

"It may now be said summarily, as the result in this respect, that the Vermont and Canada Railroad Company stand upon their lease, under the compromise decree, and the decrees and orders following, with the right to have the stipulated rent paid out of the net earnings. Subject to this, the mortgage bondholders of the Vermont Central Railroad Company stand upon their mortgages, under the compromise decree, and the decrees and orders following, with the right to have the net earnings appropriated according to the respective provisions in that behalf. 'Net earnings' means what is left after paying the legitimate cost and expense of making earnings by the use of the property. The holders of the trust bonds stand upon the rights created and vested by the respective transactions constituting the issue, appropriation, and receipt thereof respectively, including a right to the security provided, according to the legal effect of the provision making such security. The bonds were taken for the required consideration, in faith of the promise to pay interest and principal as stipulated, and in reliance on the security provided and pledged. This vested in the bondholder the right resulting from the transaction by the legal effect of the promise, and to the security pledged. This is in no manner affected by the fact that the promise may not be performed, and the security may prove inadequate and worthless. Of course, the bond buyers knew what they were buy-

ing; namely, a bond issued and secured in the carrying on of the management of the property by the persons in charge, as such management was shown by the records and files and official documents to have been created and carried on, and which might continue to go on indefinitely in the uncertain future. In view of this, each bondholder took the hazard of both the present and prospective value of his bonds, as depending on the ability of the promisor and the value of the security. If it should turn out that the pledged property had been used up or become worthless, and the car service fruitless, and the guaranty of the Vermont and Canada Railroad Company a barren resource, that would not touch the validity and operative force of the contract and the pledge. As to what is called the 'floating debt,' which rests upon the credit given to the trust management, the reason is not obvious why that debt should have precedence to any other of the trust debts, — trust debts, as distinguished from the claims of the Vermont and Canada Railroad Company and the Vermont Central bondholders. The secured trust debts were contracted in the carrying on of the business of the management, for the purposes contemplated and sought to be accomplished by the managers, — just as a floating debt has been contracted, and for the same purposes. It can make no difference whether that debt is due to outside parties, or to the parties managing. It is equally on the credit of the trust. The fact that it is without specific security does not give it a higher rank or a different right from debts with security. It stands upon the credit which induced the contracting of it, namely, the promise of the managing party in view of ability and means for payment, just as the secured debts stand on the same credit and the security provided. What is now claimed is, that that debt shall have precedence of the other trust debts, making it first in right as to means of payment, even to the appropriation of the security pledged for the payment of the other debts. There would be no warrant for this, even in case of a proper receivership. The trust is the debtor to each and all its creditors. In the settlement of estates of deceased debtors, the statute gives priority to doctors' bills, and other expenses of the last sickness, and funeral charges. But we know of no statute or rule of law that would warrant the priority claimed in this case. . . . .

"In view of that relation, is there any warrant of law for order-

ing a sale of the property? No case and no book has been presented or come to our notice in which it has been propounded or held that, in a real receivership for managing property, to realize profits by use, and not with a view to its ultimate sale, and the realization of money assets thereby, the property has been or should be sold to realize means for paying charges incurred in the management. The cases are numerous of sales by receivers under the order of the Court of Chancery. But no case is found in which such sale has been ordered as a means of reimbursing receivership expenses, in virtue of a lien in that behalf. . . . . If it were to be now held that the property itself in the hands of the Central Vermont Railroad Company is subject to the lien as claimed, such lien would not warrant an order of sale in the first instance. It would be a redeemable lien, resting upon the property in the character of an equitable mortgage; and a sale would be ordered in any event only on failure to redeem, according to the final decree in that behalf."

550. **Policy of confining trustees in their management of the property to the legitimate objects of the trust.** — The facts of the case and the grounds of the decision have thus been stated at considerable length, because the case is a remarkable one in many ways, and in its different phases has been a subject of much controversy, out of court as well as in. It presents many novel and interesting points. The case will be a warning to all bondholders and other creditors of railroad corporations against their allowing either receivers or trustees in the possession of their property to manage it otherwise than to secure its preservation during temporary emergencies. The management in this case resulted favorably, so long as it was confined to the operating of the roads as they were when the receivers were first appointed; but, seeking to secure even better results, the trustees enlarged the field of their operations, — they took possession under leases of several other railroads, and of a fleet of steamers on the western lakes. These new enterprises resulted disastrously; and the managers, after obtaining repeated loans, at last found they had incurred, in the management of the property, an indebtedness which the entire value of the roads originally placed in the hands of the receivers might prove inadequate to satisfy. The result is even worse than the improving of a mortgagor out of his se-

curity. The receivership was sought by the Vermont and Canada Company, in the year 1855, as a means of obtaining the rent of its own road, which the Vermont Central Company held under a lease. The receivers, in 1861, took possession not only of the road of the latter company, but of the road of the former, by virtue of the lease. In 1877, the creditors to whom were due the debts incurred in the management of the property were before the court, asking for the sale of both roads to pay these debts; and the result may be, that not only the mortgage creditors of the Vermont Central Company are improved out of their estate, but that the Vermont and Canada Company, which as creditor sought to collect the rent of its road, has been improved out of its own road as well.[1]

551. **Debts contracted by trustees in possession for completing the road** are preferred to the lien of the mortgage under which the trust arose, when such completion was necessary in order to preserve the value of the franchise. The Hempfield Railroad Company of Pennsylvania issued coupon bonds, and secured them by mortgage to trustees who were authorized by the deed, upon default in payment of the coupons, to take possession of the road for six months, and out of the profits to pay the bondholders. Authority was also given by the deed to the trustees to contract debts for "preserving, repairing, and maintaining" the road. The company by deed delivered possession to the trustees for six months, and afterwards by deed continued the possession until the bonds should be paid. The trustees contracted debts to a large amount for work done and materials furnished, and also completed the road by laying down rails after the road-bed had already been constructed by the company. Upon a subsequent foreclosure sale, a master was appointed by the court to distribute the fund, and he reported in favor of those creditors whose claims had arisen during the trustees' possession, excluding the bondholders and creditors whose debts had been contracted

[1] Although there are some cases of improvident management of railroads by trustees and receivers, and others, where they have apparently managed for their own benefit first of all, and in the second place for the mortgagees at whose instance they were appointed, and last of all for those interested in the equity of redemption, yet there are not a few cases where the management of trustees and receivers has been such as to produce profits where no profits had been made before, or to restore profits which corporate officers had failed to keep up.

before the delivery of the road to the trustees under the deed.[1] The bondholders having excepted to the report, Sharswood, J., at *nisi prius*, dismissed the exceptions.

The iron for the rails laid down by the trustees on this road they paid for partly in cash and partly in bonds of the company, subject to redemption at par in one year. The holder of the bonds so issued claimed that they were not taken in payment, but that the right to redeem stamped them as collateral security, and therefore that he was entitled to preference in the payment of the debt as one contracted by the trustees in the performance of their trust. His claim was allowed and charged upon the fund.[2]

The right of the trustee in possession to repayment of his advances and expenses on account of the property takes priority of the mortgage under which he acts, and of the claims of all subsequent creditors. He is the owner of the property at law, and when called upon to account he may deduct out of the trust property whatever sums he had expended or become liable for in the discharge of his trust. His claim is the first charge upon the property.[3]

552. A creditor or other person not holding the position of trustee has no right to be reimbursed his advances to protect a corporation in preference to mortgage creditors; but one who does not hold the legal title and does not legally represent the bondholders in his possession and management of the property, but being a creditor and stockholder in a company voluntarily advances money for the payment of wages, rents, and other purposes essential to prevent the immediate sacrifice of the property, has no claim to be repaid in preference to the mortgage bondholders. A company, formed for the purpose of manufacturing iron, mortgaged its property and afterwards borrowed money from one Grissell, the former owner of the works and then a shareholder in the company, under an agreement that all moneys due to the company were to be received by him, and these moneys, and also the money to be advanced by him, were to be applied by him in paying wages and salaries and other outgoings for the business of the company, and finally to the repayment of his advances. Subsequently the company resolved to wind up voluntarily, and an order of court was made for this

[1] Patterson *v.* Hempfield R. R. Co. Supreme Court of Pa. at N. P. 1 Weekly Notes of Cases, 127.

[2] Patterson *v.* Hempfield R. R. Co. *supra.*

[3] Hall Coal Co. *in re*, 35 Beav. 449.

purpose. Afterwards Grissell and the liquidators, with the sanction of the vice chancellor, made an agreement for an advance by Grissell of further sums on similar terms. He accordingly made further advances for the payment of rent, wages, taxes, and outgoings. A large balance remained due to him when the liquidators sold the leasehold property, machinery and plant of the company. Grissell claimed the repayment of his advances in carrying on the business in preference to the debenture holders, and the vice chancellor allowed the claim as costs of preservation. But on appeal it was held that the fund arising from the sale belonged to the debenture holders in priority to the claims of Grissell or the liquidators for the costs so incurred. The debenture holders were not parties to the agreement with Grissell, and the sanction to the agreement given by the court did not bind them. No debenture holder was summoned before the court, or was asked whether he approved the arrangement. No one represented the debenture holders, and they were not affected by anything that was done.[1] James, L. J., delivering the principal judgment of the court, clearly states the rights of the debenture holders: "It is said that the transaction was for the benefit of the debenture holders, and that if this property had been sold at that time, in all probability, it would have sold badly, and therefore it was for their benefit that the works should be carried on. But then the debenture holders were the persons who had a right to express their opinion whether the business should be carried on at their risk. Of course as long as the company were minded to keep it on, the debenture holders might very reasonably be minded not to interfere with what their mortgagors and debtors were doing, because their security — the thing which constituted their security — was still remaining *in esse* to answer their demands. Therefore they had no occasion to apply their minds to the question whether it would be to their benefit or not that the works should be carried on. Their debtors, who acted with the sanction of the court, thought it was for their own benefit that it should be carried on, but that left the property still remaining liable to the charge."

The liquidators then claimed priority for their costs, expenses, and remuneration; but the court adjudged that their claim could not be sustained. The same learned judge said that no doubt it is a very hard case for them that they have had to deal with an

[1] Regent's Canal Iron Works Co. *in re*, L. R. 3 Ch. D. 411.

insolvent company, but they ought to have looked into that matter before they incurred expenses and made themselves liable; and that they should not have incurred disbursements which they had no means of reimbursing themselves. The debenture holders are the creditors to whom the property belonged; they had a specific right to the property for the purpose of paying their debts. If the property is realized in the proceedings to which they are parties they must pay the costs of the realization, just as they would have had to pay them if they had their own suit for the purpose of realizing it. No doubt there were costs of preservation, which means that by keeping the thing going for some years the property ultimately realized more for the debenture holders than it would have otherwise realized. But this is merely a surmise, and if true it would really make no difference. The services rendered in that way cannot create a charge against the mortgagee. The only costs for the preservation of the property with which they would be chargeable would be the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, and the care of the property. The liquidators in this case never paid anything of the kind. The leaseholds, machinery, and plant were never the subject of expenditure on the part of the liquidators."

553. Compensation of trustees.[1] — The Des Moines Valley Railroad Company executed a mortgage upon its road and lands, which stipulated, among other things, that the holders of any of the mortgage bonds should have the privilege of purchasing any of the lands not required by the company for the necessary or convenient operation of the road at the then minimum price fixed by the company, and to pay therefor in bonds at their par value. The mortgage also stipulated that the proceeds of the sales of lands should constitute a sinking fund for the discharge of the mortgage debt; and that the bondholders should be required to cancel the bonds so taken up, and that for services in selling and conveying the lands, and applying the proceeds to the sinking fund, the trustees should receive two per cent. on the amount of the bonds cancelled. Upon a subsequent foreclosure of the mortgage the trustees filed their account, showing that they had can-

[1] On the general subject of the compensation of trustees, see 2 Perry on Trusts, §§ 916–919; and see §§ 527–530.

celled bonds to a very large amount on which they claimed the above named commission. Some of the bondholders appeared and objected to the allowance of two per cent. on the face of the bonds received by them in payment of lands sold, but the Supreme Court of Iowa held that the sale of lands and the payment in bonds was equivalent to a sale for cash, and that therefore the trustees were as much entitled to this commission upon the par value of bonds received in exchange for lands and cancelled as they were upon bonds cancelled upon purchase with the proceeds of cash sales of the lands, the mortgage recognizing no distinction between the modes of payment.[1]

554. The funds in the hands of a receiver are chargeable with the retainer and professional services of an attorney employed by the trustees under a mortgage of a railway to foreclose the mortgage, although the suit, without the fault of the attorney, was not prosecuted with effect, and the funds in the hands of the receiver have been obtained from a new suit, prosecuted by other trustees; as for instance where the prosecution of the first suit was prevented by the outbreak of the civil war, and the trustees who authorized the suit having died, new trustees were appointed upon the termination of the war, who commenced a new foreclosure suit.[2]

555. Trustees managing a railroad are not liable for the use and occupation of land outside the location of the railroad, in the absence of any evidence of a demise, whether the use was by permission of the owner or not. A contract, express or implied, is necessary to sustain the action.[3]

II. *Liability of Trustees operating a Railroad as Common Carriers.*

556. Trustees operating a railroad for the benefit of the bondholders are regarded as owners of the road, so far as to render themselves liable as common carriers for loss or damage to merchandise, or for damages to passengers occasioned by the

[1] Gilman *v.* Des Moines Valley R. R. Co. 41 Iowa, 22.

[2] Cowdrey *v.* Galveston, Houston & Henderson R. R. Co. 93 U. S. 352; *S. C.* 9 Am. Railway Rep. 361.

[3] Central Mills Co. *v.* Hart, 124 Mass. 123.

negligence of their servants and employees. Thus, the trustees of the second mortgage bondholders of the Northern Railroad Company having foreclosed their mortgage, by permission of court, purchased the mortgaged property at the sale, and proceeded to operate the road for the benefit of the bondholders. They undertook to transport a large quantity of grain, which was burned on the road. In a suit against them for the loss of the goods, they were held liable as common carriers.[1] The fact that, by the decree authorizing the trustees to purchase at the foreclosure sale, the court undertook to give directions as to the mode of executing the trust in respect to a subsequent sale, and in respect to operating the road, was held not to change the character in which they held the property, and make them receivers of the property. They continued to hold the property as trustees, and as such held the legal title to the property, and received the income and profits of it for the benefit of their *cestuis que trust*.[2]

The same liability attaches to a mortgage trustee who has entered into possession of a railroad in pursuance of the provisions of the mortgage, or in pursuance of a statute and decree of court, and, before completing a foreclosure, operated the road for the benefit of the bondholders.[3] In Connecticut, by statute, such trustee is declared not to be personally liable for any cause or injury arising from the operation of such road, except for his wilful mismanagement, or for any contracts made by him as such trustee; but all the trust property in his charge is liable for the acts and proceedings of such trustee, in the execution of his trust, to the extent of the interest of the creditors, for whose benefit he acts; and any proceedings for the purpose of making such property liable should be brought against such trustee, describing him as such.[4] Under a statute authorizing trustees in possession to apply the income of the road to the payment of the "running and operating expenses of the road," a claim for negligently injuring property at a highway crossing would be properly included.[5]

[1] Rogers *v.* Wheeler, 43 N. Y. 598; Barter *v.* Wheeler, 49 N. H. 9; Sprague *v.* Smith, 29 Vt. 421.

[2] Barter *v.* Wheeler, *supra*.

[3] Lamphear *v.* Buckingham, 33 Conn. 237.

[4] G. S. 1875, p. 333, § 85; G. S. 1866, p. 196, § 513.

[5] Smith *v.* Eastern R. R. Co. 124 Mass. 154.

CHAPTER XIX.

THE PRIORITY OF RAILROAD MORTGAGES NOT AFFECTED BY EQUITIES ARISING SUBSEQUENTLY.

I. Equities of employees, 557–561.
II. Equities of contractors and materialmen, 562–565.
III. Equities under subsequent contracts and leases, 566–569.
IV. Equities under judgments against receivers, 570–572.

I. *Equities of Employees.*

557. General statement. — Railroad bondholders have, within the last few years, sometimes experienced much surprise, to say nothing of other and stronger emotions, at finding, in the course of events, that mortgage liens, which were nominally and actually, at the time they were created, first liens upon the mortgaged property, have been adjudged by the courts to be subject to other claims subsequently incurred. They have not merely seen debts incurred by receivers and trustees in the management of the property accorded a priority over their mortgages, but they have also seen the same priority accorded to the claims of laborers and mechanics, and to all that undefined indebtedness of a railroad company, known as floating debts. It is proposed to examine, in the present chapter, the various ways in which it has been sought to supersede the priority of railroad mortgages by subsequent equities.

At the outset it is proper to state as a settled legal principle, that a fixed legal right under a mortgage cannot be impaired by any equities subsequently arising. Statutes in force at the time of execution of a mortgage may give rights as against the mortgagee to other persons, under claims subsequently arising ; but in such case the statutes become a part of the original mortgage contract. Subsequent legislation could not affect the priority of an existing mortgage. Even Congress cannot limit the tolls of a canal company whose revenues are pledged to secure its bonds,

so as to impair the rights of the bondholders. Mr. Justice Miller, construing an act relating to the Louisville and Portland Canal Company, emphatically said: "I have no hesitation in saying, that that part of it which so limits the tolls is void, for the plain reason that it is a legislative attempt to destroy vested rights and a taking of private property for public use without due compensation." [1]

The claims of employees of a railroad, due at the time it is placed in the hands of a receiver, are, in New Jersey, provided for by a statute,[2] which makes them a lien upon all unincumbered personal effects, and all moneys which may be transferred to the receiver at the time of his entering upon his duties, but limits the payments to not more than two months' wages. Under such act, however, the claims of employees are subject to incumbrances upon such property existing when the act was passed. The lien cannot be extended beyond the provisions of the act, which, though it will receive construction, cannot, of course, be so construed as to diminish or impair the obligation or lien of a previous levy of an execution, or of a previous mortgage.[3]

558. **The most reasonable ground upon which a chancery court can order a receiver to pay the wages of employees of a railroad company,** due at the time the road is placed in the receiver's hands, is that taken by the Court of Appeals of Kentucky, in the recent case of *Douglass* v. *Cline*.[4] The Louisville, Cincinnati, and Lexington Railroad Company executed a mortgage to a trustee, which authorized him, upon default, to take possession of the property, and by himself and agents, or by a receiver of court, to use and operate the road and receive the earnings and income of it, or to have the mortgaged property sold and conveyed under a decree of court. No specific lien was given upon the earnings of the road while held and operated by the company itself. Upon default, the trustee, instead of taking possession of the road himself, obtained the appointment of a receiver. Shortly after-

[1] United States v. Louisville & Portland Canal Co. 4 Dill. 601. Judge Dillon, in note to this case, says, that in England parliament would possess this power, as shown by the case of Brown v. Mayor, &c. of London 9 C. B. (N. S.) 726.

[2] Feb. 12, 1874, Acts 1874, p. 12; 2 Rev. 1877, p. 943, § 161.

[3] Williamson v. N. J. Southern R. R. Co. 28 N. J. Eq. 277, 300.

[4] 12 Bush, 608. And see Newport & Cincinnati Bridge Co. v. Douglass, 12 Bush, 673.

wards, the employees of the road, to whom wages were due at the time of the appointment, obtained an order from the vice chancellor, directing the receiver to pay them the amounts due them out of the net earnings of the road; and this order was sustained upon appeal. The decision of the court had special reference to the nature of a mortgage, as determined by the Code of Procedure of that state, under which the mortgagee, although invested with the legal title, cannot recover possession in an action at law. Having no legal right to recover possession simply by reason of holding the mortgage title, his right of possession must rest upon express contract, or else must be sought in equity. But in this case the trustee, either because the express contract in the mortgage could not be enforced, or because he did not see fit to enforce it, sought his remedy in equity, and obtained the appointment of a receiver. It was then insisted, in behalf of the mortgage bondholders, that inasmuch as it was made to appear to the satisfaction of the chancellor that he ought to take possession of the mortgaged property, he was bound to do so unconditionally, and that he had no discretion as to the application of the fund that might come into the receiver's possession, but was bound, as matter of law, to apply this fund to the extinguishment of the lien debts in the order of their priority. But the court declared, that, while the mortgagees had, in equity, a perfect right to have the property protected and preserved while the actions to enforce their mortgages were pending, yet the power of the court to do this through the instrumentality of a receiver is discretionary in its nature; that the right of the mortgagees to have the fund raised by the receiver applied for their security as against the general unsecured creditors of the mortgagor is equitable only, and, therefore, that the chancellor is not bound to enforce it under all contingencies, but may, in proper cases, attach to its enjoyment reasonable conditions, and may do this either in the order appointing the receiver, or by an order subsequently made.

559. The court lay stress upon the meritorious character of the claims of the employees; upon the fact that their services in repairing and operating the road had preserved the property, and enabled the company to retain its business and the public confidence, and therefore had resulted in substantial advantage to the mortgagees, who are insisting that the payment of the em-

ployees out of a fund to which they have no legal or contract right, and which they can reach only through the intervention of the chancellor, is an abuse by that officer of his equitable discretion. It was to the interest of the lien-holders, they say, that the receiver should be enabled, pending the litigation, to operate the roads of the company successfully and profitably. To secure immediate success in this regard, itw as desirable, if not indispensably necessary, that he should be enabled to retain in his service the force of employees he found in the service of the company when he took possession of its roads. One of the grounds of the application for a receiver was the discontent upon the part of the employees, resulting from the non-payment of their wages. "It was the duty of the chancellor to allay this discontent, and to assist his receiver in securing the services of these people, and thus insure the profitable management and operation of the roads in his hands, if this could be accomplished by an act manifestly just, certainly within the scope of his judicial powers, and to which the appellants ought not, in good conscience and fair dealing, to object." Moreover, the court declared, it is not strictly accurate to say that the employees bear to the mortgagees the same relation as that borne them by other general creditors of the insolvent company. "The mortgagees accepted their securities with knowledge that the railroad company, though technically speaking a private corporation, was under obligations to the state to render certain important public services. They knew that the railroads were, in a certain sense, public highways, and that whoever owned them, or held them in pledge, was obliged to see that they were at all times so operated as to subserve the public convenience. The interest the public has in the construction and successful operation of lines of railway has influenced the courts to treat railroad mortgagees as possessing rights superior to those of beneficiaries under mortgages covering other kinds of property; and courts of equity have not hesitated to interfere for their protection in cases in which other mortgagees would have been left to their remedy at law. . . . . It was through the labor and services of these employees, performed and rendered after the railroad company had become notoriously unable to meet its indebtedness, and during a period when the mortgagees either could not or would not interfere to protect and preserve their mortgage security, that the company's roads were operated and its duties to

the public discharged; and, as we have already seen, it was by this labor and these services that the mortgaged property during this period was preserved and kept in repair. It is plain, therefore, that the debts due to the appellees were contracted for labor which resulted in substantial advantage to the parties who are here insisting that their payment out of a fund to which said parties have no legal or contract claim, and which they can reach only through the intervention of the chancellor, is an abuse by that officer of his equitable discretion."

In conclusion, the court remark that it will not necessarily follow from its decision that all the general creditors of the railroad company will be able to assert successfully their right to be paid out of the fund held by the receiver; that each claim must rest upon its own peculiar merits; and that, as the mortgagees have *primâ facie* an equitable claim to the whole fund, the *onus* will be upon each general creditor to establish a superior right upon his part.[1]

[1] Mr. Justice Cofer delivered a dissenting opinion, forcibly criticising the opinion of the majority of the court. He claimed that the maxim that "He who seeks equity must do equity" had no application to this case; that the mortgagees owed no equity to the railroad company, and owed none to the employees of the company; that the effect of the application of the maxim to this case is that, if A. asks the intervention of the chancellor in his behalf against B., the chancellor may, as the condition upon which he will grant the relief asked, require A. to render to C. an equity due him from B.; that this is not the meaning of the maxim; but that it means that a party seeking the aid of equity must do equity to him against whom he seeks relief in reference to the subject matter involved in the litigation. He claimed that the mortgagees had liens on the earnings of the property while in the hands of the receiver by express contract, which the court was bound to enforce; and, moreover, he claimed that, aside from any contract, by well established rules of equity, mortgagees have a lien upon the earnings of the property in the hands of a receiver, pending a suit for foreclosure and sale, and that the earnings are a part of their security of which the chancellor has no power to deprive them. In conclusion he says: "I have been unable to discover the line that is to separate the claim of the employees from the claim of other unsecured creditors. Nor am I able to discern the principle that is to distinguish the claim of the employees of a railroad company to be paid in preference to mortgagees from the claim of any other class of laborers, to be paid in like manner out of mortgaged property upon which they have bestowed labor for which they have not been paid. If these appellees have any equity to be paid out of the earnings in the receiver's hands for labor done before his appointment, because they bestowed their labor on the road, and thereby kept it up, why shall not the material-man who furnished articles indispensable to the operating of the road be paid also? If the men who furnished necessary material are entitled to be paid, upon what principle of law or morals shall the man who furnished money to make cash purchases be refused? And if these are to be paid out of the earnings, to the exclusion of the mortgagees, there will remain no debts to be paid but the

An important element in this decision is the inability of a mortgagee, under the present Code of Kentucky, to recover possession of the mortgaged property after default by an action at law. It would, therefore, be no authority in states where the mortgagee's right of possession remains as it was at the common law. The argument drawn from expediency, and from the meritorious nature of the claims of employees, is one which might well be considered by the mortgagees themselves, but is entitled to no consideration from the court, as against the positive legal rights of mortgagees. There are numerous instances in which the mortgagees themselves have voluntarily assumed the payment of wages, and other floating debts of railroad companies, at the time of taking possession. This is their own affair, and is simply a waiver of their own legal rights. But if they do not choose of their own accord to do this, the courts have no right to compel them to give priority to unsecured claims.

It is true, however, that the general result arrived at in this case is supported by a decision by Judge Wellford, in the Circuit Court of the city of Richmond.[1] The grounds of the decision are that the officers of the insolvent company, having the right of possession, and being allowed by the mortgage creditors to remain in possession long after the company's default had become notorious, might be in some sense regarded as the agents of the mortgagees in operating the road; and that, at any rate, the claims of employees, due at the time the mortgagee obtained the appointment of a receiver, are of such an equitable nature that the court will require them to be satisfied out of the subsequent earnings of the road, or out of the trust property.

560. It sometimes happens that mortgage creditors find it a matter of policy to assume the payment of certain general debts of railroad corporations, and to consent to the entry of decrees requiring their receivers to pay such debts out of the receipts of the road or from the proceeds of sales of the mortgaged property.[2] The claims of laborers and employees more frequently than any others are so provided for. Aside from the equitable

mortgage debts, and, these being postponed to all others, it will result that the only persons not secured are those who alone had taken security for their debts."

[1] Duncan *v.* Chesapeake & Ohio R. R. Co. 9 Am. Ry. Rep. 386.

[2] See 4 Central L. J. pp. 458, 544.

consideration that their labor has benefited the property, there is the practical consideration that it is generally necessary or at least desirable that the receivers, and after them the purchasers, should continue the operation of the roads by the aid of the services of the same persons. Sometimes mortgage creditors even find it to their advantage to compromise the claims of other general creditors. Delay in obtaining the appointment of receivers, and through them the possession of the property, may be avoided; and such delay is a serious matter when a road extends through several states, and the aid of the courts of each must be sought and obtained against the active efforts of creditors. Such considerations doubtless led the mortgage creditors of the Atlantic and Great Western Railway Company to consent that the decree appointing a receiver of the road should provide for the payment, out of the net earnings of the road, of claims for materials and supplies and of arrearages owing to the laborers and employees of the company "for labor and services actually done in connection with that company's railways." Under this decree Jeremiah S. Black, Esq., claimed payment of $5,000 for professional services as counsel for the company, rendered prior to the appointment of the receiver. The referee to whom the claim was referred found it to be reasonable in amount, but that the claimant was not included in the class provided for in the order; that the word "employees," as there used, included only those persons who had been in the stated and regular employment of the company. The Supreme Court of New York also took this view of the claim, and disallowed it.[1]

The Court of Appeals, however, reversed this decision and sustained the claim.[2] The claimant was considered an employee who had rendered services in connection with the company's railways within the terms of the order. Whether he should be so regarded or not was a question as to the intent of the order, and it was regarded as more probable, from the terms of the order, that the intent was to include rather than exclude the debt of the claimant. This intent was moreover regarded as established by evidence as to the sense in which the parties used the words, and by the circumstances of the case. Debts for materials and supplies were protected, and why might it not be supposed that the claimant's demand was regarded to be as just and equitable as those,

[1] Gurney *v.* Atlantic & Great Western Ry. Co. 2 Thomp. & C. (N. Y.) 446.

[2] *S. C.* 58 N. Y. 358. See 24 N. Y. 482.

especially under the circumstances referred to? The mortgage creditors, by making these concessions, gained what they regarded a great advantage, — the immediate appointment of a receiver; and the order should be liberally construed in favor of the creditors, who are presumed to have assented to it and relied upon it for the payment of their debts.[1]

Notwithstanding the force of these views, upon which the majority of the court based its decision, it may well be questioned whether the mortgagees in consenting to this order supposed that any other than the usual meaning would be attached to the words "laborer" and "employee;" and the fact that three of the judges of the Court of Appeals dissented from the allowance of the claim at least weakens the authority of the decision.

561. In no case has any one of the federal courts allowed claims for supplies or for labor in preference to existing mortgages when the mortgagees have not consented to such allowance. In one case, indeed, after supply claims and other floating debts to the amount of $700,000 had been audited and paid by the receivers with the consent of the parties in interest, objection was finally made to a similar claim of small amount presented at the eleventh hour, when Judge Treat, of the Circuit Court, followed the settled rule of law and rejected the claim.[2] It does not matter at how recent a period before the receivers took possession the supplies were furnished, or how permanent in character they may be, the court cannot order them to be paid if the beneficiaries under the mortgage object.

II. *Equities of Contractors and Material-men.*

562. It has sometimes been sought to establish equities in favor of those who have furnished material or money for building or repairing of railroads, on the ground that the property has thus been conserved and rendered capable of profitable use. This is, in fact, an attempt to apply to railroads the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnishes necessary repairs and supplies to a vessel. Thus, in *Galveston R. R. Co.* v. *Cowdrey*,[3] a person

[1] Gurney v. Atlantic & Great Western Ry. Co. 58 N. Y. 358, per Church, C. J.

[2] Ketchum v. Pacific R. R. Co. 4 C. L. J. 458, 459.

[3] 11 Wall. 459, 480.

who had furnished the iron laid upon a portion of the road claimed therefor an equitable lien in preference to an existing mortgage: first, because the mortgage covered the iron only as after-acquired property, and upon the principle of equitable estoppel, which should yield when it comes in conflict with a superior equity; and, secondly, because his property applied to the road had rendered it capable of being operated, when it otherwise could not have been used. The Supreme Court of the United States denied the claim on both points, declaring that the mortgage attached to the property as soon as it was acquired, and that the principle of maritime law contended for had no application. Mr. Justice Manning, referring to this case, in giving the decision of the Supreme Court of Alabama, in the recent case of *Meyer* v. *Johnston*,[1] with reference to the latter principle, said: "A ship far from home, in distress and without resource, must perish, and perhaps her crew with her, if a bottomry bond given then for repairs and supplies shall not have precedence of other liens upon the vessel. But the court does not consider a railroad on *terra firma* so beyond the reach of help from those who own it, or are concerned in it, as to justify the adoption, in such a case, of the rule relating to a ship abroad, and about to perish."

Accordingly the court, in this case, refused to give precedence to the claim of a contractor for repairing and completing a railroad, although by contract with the company he was to have possession of the property until his claims were paid.

563. A mortgage by a railway company of their "road, built and to be built," has precedence, even as regards the unbuilt part, of the claim of a contractor who has himself furnished a portion of the road, under an agreement that he should retain possession of the road, and apply its earnings to the liquidation of the debt due him, and who has, in accordance with such agreement, taken possession of the road, and retained it. The Supreme Court of the United States so held upon a bill filed for the foreclosure of such a mortgage, which had been duly recorded several months before the contract for building the road was made.[2] Said Mr. Justice Clifford: "All of the bonds, except those sub-

[1] 53 Ala. 237, 345.

[2] Dunham *v.* Cincinnati, Peru, &c. Ry. Co. 1 Wall. 254.

sequently delivered to the contractor, had long before that time been issued, and were in the hands of innocent holders. The contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance; but, if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant; and, in that point of view, the case does not even show a hardship upon the contractor, as he must have known, when he accepted the agreement, that he took the road subject to the rights of the bondholders. Acting as he did, with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad mortgages made to secure the payment of bonds, issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied." But the court say, that, although some authorities seem to favor the supposed distinction, the argument, in their view, is not sound, and the weight of judicial determination is greatly the other way.

564. **The order of priority of two or more railway mortgages is not affected by the fact that a part of the road was wholly built by money raised by means of the junior mortgage.** — The giving of priority to the last creditor is a rule which is applicable only to marine cases, which stand on a particular reason. The rule, *Qui prior est tempore, potior est jure*, governs as to the priority of mortgages at common law.[1] In a recent case before the Supreme Court of Alabama,[2] an attempt was made to reverse the order of priority of mortgages, upon the ground that the prior bondholders could equitably claim only the value of the railroad and its appurtenances in the condition they

[1] Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459, 482.

[2] Meyer *v.* Johnston, 53 Ala. 237.

were in before the road was reconstructed and completed by capital furnished for that purpose under a subsequent mortgage. It was urged that, if this expenditure had not been made, a Court of Equity would have authorized a lien upon the property for the purpose of making it available; and, therefore, the court should not hesitate to approve and ratify what had been done voluntarily, and to protect those who had furnished money for the preservation and life of the road. But the court regarded it as well settled, that a prior mortgagee could not be divested of his lien in this way; and that a junior mortgage could not, by force of any lien for repairs, be given precedence of a senior one.

A junior mortgagee has no more right than the mortgagor himself to charge for repairs and improvements made upon the mortgaged property. The mortgagor not having this right, he can confer no such right upon a junior mortgagee, as against a prior mortgagee. Expenditures made by a junior mortgagee stand, in this respect, upon the same basis as when made by the mortgagor: they confer no equity whatever as against prior incumbrances.

565. A claim for materials furnished an insolvent railway company, which is not a lien by virtue of any statute, is not entitled to payment out of the funds in the hands of a receiver, arising from a sale of the property at the instance of prior mortgage bondholders, until the bonds are paid.[1]

A promise by the receiver to make such payment does not change the case. The ground of the application in this case was that the supplies were furnished to the road while it was run by a lessee, and that when the road came into the hands of the receiver, the parties who had furnished the supplies had an equitable lien upon the funds realized from the earnings of the road. They had no specific lien, legal or equitable, upon the property. The facts of the case were that there were large mortgages upon the road, and the company had become hopelessly insolvent. Application was made to the court to put it into the hands of a receiver, in order that it might be operated for the payment of these mortgages. This was done and the road remained in the hands of the receiver for some years. Subsequently other creditors applied to the court, it being manifest that the mortgages

[1] Denniston *v.* Chicago, Alton & St. Louis R. R. Co. 4 Biss. 414.

could not be paid in that way, or at any rate, that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed; and a sale of the property was ordered and made, so that the parties in interest might realize upon their claims. The court held that the petitioners had no equitable lien upon the proceeds of the sale, because the prior mortgage liens must prevail, and these would sweep away the entire fund, and would then be only paid in part. Judge Drummond, in making this decision, said, by way of illustration: "It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on; but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now, the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a Court of Equity and cut off the prior lien which exists on the farm, and prevent it from being paid. These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them, because those with whom they have dealt cannot do so."

566. Advances made by officers of the corporation. — The president and directors of the New Jersey Midland Railway Company, previous to its insolvency, advanced money to pay for rolling stock leased to the company, to be paid for by monthly instalments, and to remain the property of the vendors until the whole amount of the purchase money should be paid. They did this to preserve the property for the benefit of the company and its creditors, and with the understanding on their part that, upon the payment of the balance due upon the rolling stock, they should become the owners of it. Upon the appointment of a receiver in a foreclosure suit, they petitioned the court that they might be subrogated to the rights of the vendors of the rolling stock to the extent of the advance made by them on account of it, and that the receivers should be ordered to pay to them the amount so advanced, with interest.[1] The court, however, denied the petition, because there could be no subrogation without an express agreement for the right, either with the debtor or the cred-

[1] New Jersey Midland Ry. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

itor; and because the right could not be enforced until the whole debt was paid. Moreover, the advances were made, and the petitioners' rights accrued, long before the filing of the bill in the foreclosure suit. The payment of these claims by the receivers was nowise necessary for the preservation of the property, or the protection of the mortgagees or other creditors. The petitioners stood in a different position from the owners of the rolling stock. They had no power to embarrass the receivers by removing the property. "The duties of a receiver in a foreclosure suit," say the court, "are in aid of the mortgagee, by collecting the rents and preserving the property from loss and decay. In railway foreclosures, his duties, though more extensive, are primarily the same. The appointment is presumed to be for the benefit of the mortgagees, and for the protection of their interests. In this case it is claimed that the mortgage covers the rolling stock, and that upon full and final payment by the company, or by the receivers, to the owners of the stock, the title will vest in the company, or their mortgagees, and enure to the benefit of the bondholders. The petitioners seek, at this early stage of the foreclosure suit, and in this irregular mode, to enforce a lien alleged by them to be superior or prior to that of the mortgagees. In this view, it is simply a contest for priority between parties claiming liens upon the mortgaged premises." The court, therefore, declined to consider their claim until, upon a hearing of the cause, the rights and priorities of all parties claiming liens upon the mortgaged premises could be settled and adjusted.

One who has loaned money to a railway company, to enable it to pay interest on its coupon bonds, has no equity entitling him to be paid out of funds in the hands of a receiver of the road appointed in behalf of the bondholders.[1] A loan, however, made for this purpose, upon the agreement or understanding that the lender should be treated as the assignee of the holders of the coupons, might have the effect to subrogate the lender to their rights, and entitle him to hold the coupons as part of the debt secured by the mortgage.[2]

[1] Newport & Cincinnati Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673, 714.

[2] See § 331.

III. *Equities under Contracts and Leases made subsequently to Mortgages.*

567. Contracts made by a railway company subsequently to a mortgage are not binding upon the mortgagees, or upon receivers of the road who are appointed in their behalf, although the contracts relate to the carrying of freight in payment of a loan made to the company. Thus, the Boston, Hartford, and Erie Railroad Company,[1] having mortgaged its property to secure certain bonds, entered into a contract with the Adams Express Company, whereby the latter company loaned the former the sum of $200,000, and it was agreed that the sum should be paid by carrying freight for the express company at certain rates. Before this loan was fully repaid the mortgagees obtained the appointment of receivers, who, after entering upon their trust, gave notice to the express company that they would decline to be bound by the contract. The express company thereupon applied to the court for an order to compel the receivers to carry the freight in accordance with the contract made with the railroad company. The court held, however, that the contract was not binding upon the mortgagees, and that the receivers should disregard the contract, and should recover of the express company compensation for carrying freight, without reference to the terms fixed by the agreement. The court, upon this question, say: "The payment of the debts of the corporation previously contracted would be inconsistent as well with the nature and purpose of the office of the receivers, as with the terms of their appointment. They have no right to appropriate the property and assets of the corporation for that purpose, nor the earnings of the road while operated by them. The amounts to be allowed under the contract of the corporation with the petitioners are earnings of the road, to be acquired by services requiring outlays by the receivers, and are a part of its legitimate assets as much as if due in money. By the terms of the contract they are to be applied to the debt of the corporation. But that contract constitutes no lien upon the property or franchise of the corporation; and it is no more obligatory upon the receivers either to make the application or to render the service than the debt itself is. To fulfil that contract in all its terms will be, in substance and

[1] Ellis v. Boston, Hartford & Erie R. R. Co. 107 Mass. 1, 17.

effect, to appropriate the use of the property and the earnings of the road, *pro tanto*, to the payment of the debt to the petitioners in preference to all others."

The question of the right of the mortgagees to the income of the property during the pendency of the foreclosure suit is declared by the court to depend upon the provisions of the mortgage; and the only mode provided by that whereby the trustees may reach and control the use of the corporate property, and appropriate the income of it, being an entry by them into possession, and the filing and recording of written notice of their possession, they cannot acquire any lien upon the income of the road in any other mode. And, therefore, it was held that the lien of the mortgagees attached to the earnings of the road only from the time the trustees were themselves put into possession by the court; that the railroad company having in the mean time been adjudged bankrupt, the income belonged to the assignees from that time until the trustees were put in possession, and that, as to the compensation earned under the contract with the express company prior to the bankruptcy, the express company was bound to pay to the receivers only so much of it as might be required to reimburse the receivers for their expenses and charges, and that the express company could apply the balance to the reduction of the debt of the railroad company to them.

One clause of the mortgage provided that the remedy therein given should not deprive the mortgagees of their full rights and remedies, as they then existed, at law and in equity. "Whether this provision would authorize a foreclosure and sale of the property and franchises of the corporation, for the benefit of the bondholders, without the intervention of the trustees provided for in the mortgage; and whether, in such case, the income, from the time the receivers took possession, would be treated as incident to, and part of, the fund distributable to the mortgagees or bondholders, we need not determine, because these proceedings have not been conducted to that result. The suit having been directed to, and having resulted in possession by the trustees, for the purpose of a foreclosure *in pais*, in pursuance of the provisions of the mortgage first quoted, the effect upon the rights of all parties must be determined accordingly. The lien of the mortgagees attaches to the income only from the time of thus taking possession of the corporate property and franchises."

568. It has even been attempted to establish an equitable lien in behalf of a railroad company for carrying done for connecting lines, upon the foreclosure of mortgages upon such lines and the sale of the property. The Atlantic and Pacific Railroad Company, lessees of the Pacific Railroad of Missouri, had, before the institution of proceedings to foreclose mortgages on both roads, become indebted to the Atchison and Nebraska Railroad Company on account of services rendered by that company, in carrying freight on "through" bills of lading, and passengers on "through" tickets. This company intervened in the foreclosure proceedings, and asked payment in preference to the bondholders, on the ground that the claim was similar in its nature to the claims of employees for their wages, and also on the ground that the proportion of freight and passage money earned by the petitioning company under the contracts in question had been collected in advance by the Atlantic and Pacific Railroad Company, and was in the nature of a trust fund held by the latter company for the benefit of the former, and which, upon the appointment of the receivers, passed into their hands charged with the trust. But the court rejected the claim on the ground that it was merely an ordinary unsecured debt.[1]

569. There is no legal principle by which contracts made by a railroad company, after the execution of a mortgage, without the consent of the mortagees, and without a positive statute which enters into the mortgage contract, can be made binding upon the mortgagees or upon receivers appointed in their behalf. Such a contract, although made for the carrying of freight in payment of a loan to the company, does not bind a prior mortgagee.[2]

In a recent case before the United States Circuit Court for Virginia, upon a petition that the receivers be ordered to pay certain bills for iron and supplies furnished the company, the court decided that inasmuch as these claims rested solely upon the credit of the company, they could not be made prior to the mortgages upon the road, and that the petitioners must, therefore, wait until

[1] Ketchum *v.* Pacific Railroad Co. U. S. Circuit Court for E. Dist. of Mo. 3 Cent. L. J. 637.

[2] Ellis *v.* Boston, Hartford & Erie R. R. Co. 107 Mass. 1, 17. A guaranty of tolls was held not binding upon a prior mortgagee in Newport & Cincinnati Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673, 712. See, also, Elmira Iron & Steel Rolling Mill Co. *v.* Erie Ry. Co. 26 N. J. Eq. 284.

the road is sold, when their claims could be paid out of the surplus, if any, remaining after the mortgage should be satisfied. The court also held that claims for wages accruing before the appointment of the receivers were in the same position, and could not be made a lien prior to the mortgages.[1]

Although a receiver is not bound by a contract made by the company after the execution of the mortgage for the enforcement of which the receivership was created, yet if he ratifies the contract, it seems that the rights under such contract are not affected by the foreclosure proceedings.[2]

A contract between a railway company and a bridge company, made subsequent to the mortgage, whereby the former company guaranteed that the tolls of the latter company for the use of its bridge across the Ohio River should amount annually to a certain sum, does not affect the rights of the mortgagee, and the bridge company cannot require that the order of sale shall provide that the purchaser shall carry out the terms of this contract.[3]

When another road has, by contract, the right to run over a road in the hands of a receiver, upon the payment of a stipulated rent, and the rent is not paid to the receiver according to the terms of the contract, he may, after proper notice, sever the connection between the roads.[4]

With the consent of the court, the receiver may pay out of the funds in his hands sums collected by the insolvent company in trust for connecting railroad companies, to which the money belonged. The withholding of these moneys would be not only a breach of trust, but would probably result in the refusal of these companies to keep up business relations with the company or its receivers, and in a consequent loss of business to the road; and, therefore, the payment is justifiable as a business measure, to keep up the traffic of the road.[5]

570. A mortgage made after the execution of a lease of the property by the mortgagor, of which the mortgagee has notice

[1] *In re* Atlantic, Miss. & Ohio R. R. Co. 26 Financial Chronicle, 444, May 4, 1878. To same effect, see Denniston *v.* Chicago, Alton & St. Louis R. R. Co. 4 Biss. 414.

[2] Western Union Telegraph Co. *v.* Atlantic & Pacific Telegraph Co. 7 Biss. 367.

[3] Newport & Cincinnati Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673, 712.

[4] Elmira Iron & Steel Rolling Mill Co. *v.* Erie Ry. Co. 26 N. J. Eq. 284.

[5] Meyer *v.* Johnston, 53 Ala. 237, 353

either actual or constructive, is of course subject to the obligation of the lease. When a railroad company which has taken a lease of another road afterwards executes a mortgage, a more interesting inquiry arises, whether the mortgagee is bound by the contract of the lease or can question its validity, or foreclose the mortgage and disregard the contract. If the lease be binding upon the corporation itself, and the mortgage was given in express recognition of the contract and in subjection to it, the mortgagee cannot, any more than the corporation itself, object to the validity of the lease on account of the incapacity of the corporation to make it. A bondholder under such mortgage is necessarily in the same way bound by the contract. Neither can he avoid the effect of the lease in any particular by showing that as between himself and the mortgagor it would be prejudicial and unjust to him, to give the contract the effect the parties themselves intended it to have, and which governs as between them. To make his defence effectual he must show that it would be inequitable for the lessor as against him to claim this construction of the lease.[1]

IV. *Judgments against Receivers.*

571. A judgment or claim against a receiver for personal injuries sustained by a passenger upon the road, while it is run by the receiver for the benefit of mortgage bondholders, might possibly, at first sight, be regarded as an incident to the running of the road, and, therefore, entitled to payment out of the fund in the receiver's hands. It is certainly a claim upon such part of the fund as is not required to satisfy prior mortgage liens; but when it is sought to make such a claim superior to mortgages in existence when the right to the damages accrued, the claimant has to meet the objection, that such a lien is not one of the incidents to running a road; and it is not necessary to create such a lien in order to procure traffic and travel upon the road. It is not usual for a passenger, before purchasing a ticket over a road, to inquire whether it is in the hands of a receiver, and whether any claim that he may have for injuries will take precedence of existing mortgages upon the road. Neither do passengers inquire, in case the road be not in the hands of receivers, whether it is subject to mortgage or not; although it is evident enough that, in such case, a judgment against the railroad com-

[1] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co. 34 Vt. 1.

pany would bind only the corporation and its property, and might be rendered valueless by the action of the mortgagees in taking possession of the property, and applying the whole of it to the payment of their liens. As a matter of fact, the railroads in the United States are very generally subject to mortgage; and passengers, without inquiry, take their risk of the roads being so incumbered that judgments against them could not be collected. Why, then, upon the appointment of a receiver and the recovery of a judgment against him, should the claim be superior to existing mortgages, when it would not have been superior to them if the judgment had been rendered prior to the appointment of the receiver? The appointment does not prejudice the rights of mortgagees, or derange or affect in any way the priority of their liens.

Such was substantially the view taken by the Circuit Court of the United States in reference to a judgment rendered as damages for an injury to a passenger on the Alabama and Chattanooga Road, while it was in the hands of receivers.[1] It was regarded as too clear for argument, that, if the road had been run by the president and directors when the injury was sustained, such claim could not possibly have priority; but the receivers act merely in place of the president and directors, except so far only as the court may otherwise direct. They are appointed to take care of the property, and are like administrators, who cannot override existing liens, and who are under no personal liability to respond, except for their own personal neglect. The court in this case examined the orders appointing the receivers and directing their administration, and found nothing in them to establish any prior lien in behalf of such a judgment creditor. These orders appoint a receiver to take charge of the entire property of the road, to complete it and put it in repair, and to procure rolling stock and other things necessary to operate it to the best advantage, so as to prevent the property from further deteriorating, and to save and preserve it for the benefit and interest of the first mortgage bondholders, and all others interested in it. For these purposes the receivers are authorized to borrow money and make the payment of the loan a first lien upon the property. The funds raised by loan, or received from any other source, and which may not be required for the purposes before mentioned, or for their own ser-

[1] Davenport *v.* Alabama & Chattanooga R. R. Co. 2 Woods, 519.

vices, are to be paid into court for the use of the bondholders. In conclusion, Judge Woods says: "The exercise of power by a court to displace liens can only be sustained on the ground of actual necessity; and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts. The party has a right to be paid from the fund remaining after satisfying prior rights. He has a right to be allowed his claim to be paid from an excess remaining. He has the same right against the property which he could have had if the road had been run by the president and directors when his right accrued, and none other. . . . . It cannot be said that the giving of a prior lien to a traveller for damages is an expense incident to the execution of the trust which was created in behalf of the mortgagees. Such a claim is, in fact, no 'expense' at all, in the proper or ordinary sense of the word. It is a liability resulting secondarily from operating the road, and that is all."

572. A claim or judgment, however, against a receiver for the value of goods lost in transportation, or for damages done to property while the road was in his hands, is regarded as an expense incidental to the management, and therefore payable out of the earnings of the road, or other funds in the receiver's hands.[1]

There is no exemption of property in the hands of a receiver from the operation of the tax laws of the government within whose jurisdiction such property is situated. The Circuit Court of the United States for the Southern District of New York having appointed receivers of the New York and Oswego Midland Railroad Company, pending a suit for the foreclosure of a mortgage upon the road, the receivers applied to the court to enjoin tax-collectors from executing warrants for taxes assessed on the mortgaged property, on the ground of irregularities in the assessment of the taxes; but, the warrants appearing to be regular, and the collectors acting in good faith in the discharge of their duty, the court refused to enjoin them. Judge Blatchford, rendering the decision of the court, said:[2] "There is no prerogative of sovereignty which is of higher importance than the power of taxation, which includes the collection as well as the assessing of

[1] Cowdrey v. Galveston, Houston & Henderson R. R. Co. 93 U. S. 352.

[2] Stevens v. New York & Oswego Midland R. R. Co. 13 Blatchf. 104.

the taxes. The very existence of the state as a government depends upon the exercise of such power. Except under very special circumstances, such power ought not to be interfered with by injunction. If any person is aggrieved by the exercise of the authority of the tax-collector, he has an adequate ultimate remedy in an action against the wrong-doer, with the preliminary remedy afforded of directly reviewing the proceedings according to the method, and before the tribunal, provided by the laws of the government under whose authority the proceeding takes place."

The priority of mortgages over judgment and other creditors is in England established by statute,[1] which provides that all money borrowed or to be borrowed by a company on mortgage or bond, or debenture stock, under the provisions of any act authorizing the borrowing of it, shall have priority against the company, and the property from time to time of the company, over all other claims, on account of any debts incurred or engagements entered into by them after the passing of the act, provided that this priority shall not affect any rent charge or any claim for land taken, used, or occupied by the company for the purposes of the railway.

[1] Railway Companies Act 1867, 30 & 31 Vict. c .127, §23.

CHAPTER XX.

LIENS AFFECTING THE PRIORITY OF RAILROAD MORTGAGES.

I. Application of general lien laws to railroads, 573–578.
II. Special lien laws applicable to railroads, 579–582.
III. Statutes of the several states giving liens upon railroads, 583–610.
IV. Vendor's lien, 611.
V. Transportation certificates, 612.
VI. Judgment lien, 613.

I. *Application of General Lien Laws to Railroads.*

573. The general lien laws in favor of mechanics and others who perform labor and furnish material for the construction of buildings are usually regarded as having no application to railroads, except so far as they give a lien for structures connected with railroads, which come strictly within the designation of buildings. Objection has sometimes been made to the application of the general lien laws to railroads even to this extent, for the reason that it is regarded as contrary to public policy to allow them to be sold in pieces and destroyed, when they are so necessary to public use and convenience.[1]

Although this view seems to prevail in Pennsylvania,[2] and has at times been entertained elsewhere, and on this ground buildings of a railroad or other public corporation have been held not to be subject to lien under the general lien laws, yet the prevailing view is otherwise, and a building erected for a railroad company is generally regarded as within a statute giving a lien for work done and materials furnished in the construction of "any dwelling-house or other building."[3] The doctrine that a railroad is an entire thing cannot be applied so as to cut off such a lien, because the property to which it attaches does not become a part of the

[1] McPheeters *v.* Merimac Bridge Co. 28 Mo. 465; Dunn *v.* North Mo. R. R. 24 Mo. 493.

[2] Foster *v.* Fowler, 60 Pa. St. 27; McIlvain *v.* Hestonville & Mantua R. R. Co. 5 Phila. (Pa.) 13; Evans *v.* R. R. Co. (Pa.) 5 Leg. & Ins. R. 107; 11 Pitts. L. J. 4.

[3] Hill *v.* La Crosse & Milwaukee R. R. Co. 11 Wis. 214; Botsford *v.* New Haven, Middletown & Willimantic R. R. Co. 41 Conn. 454.

entirety for that purpose, until the lien is discharged, any more than it would if the lien had been created by a mortgage executed by the company.[1]

574. **A railroad bridge is not a building within the meaning of the word in a general lien law.** — Thus, under a statute giving a lien for work done, or materials furnished, in the erection or construction of "any dwelling-house or other building," a railroad bridge is not included as subject to the lien.[2] A bridge is not a "building." This word in common usage, and in its exact signification as well, means a structure designed for the habitation of man or animals, or for the sheltering of property. A bridge may be *built*, but the structure is not a *building*. A railroad may be *built*, and the structure is just as much a *building* as is a bridge. The statute, also, by speaking of the lot on which the building stands, and making the interest of the owner therein, to an amount not exceeding one acre in a city, or forty acres in the country, liable to the lien, indicates that it did not contemplate any such structure as a bridge.

575. **A railroad bridge is not an improvement** within the meaning of that word as used in a general lien law. Under a former lien law of Missouri, applicable to the county of St. Louis, it was held that there could be no lien for labor performed, or materials furnished, for the construction of bridges and culverts upon a railroad, although the law gave such a lien for "improvements" as well as buildings. The decision was placed upon the ground that a railroad is a public work, established by public authority for the public use and benefit; and that a lien, with a power of enforcing it by execution, would subject the portion of the road affected by it to sale, and might deprive the public of the benefit contemplated in the grant of the corporate franchises. The Constitution of the state then required the fostering of public improvements, and the state had assumed great responsibilities in building railroads for the public use, and it was regarded as unreasonable to suppose a power remained in any individual to deprive the public of the benefit of such improvements.[3]

[1] Hill *v.* La Crosse & Milwaukee R. R. Co. *supra.*

[2] La Crosse & Milwaukee R. R. Co. *v.* Vanderpool, 11 Wis. 119.

[3] Dunn *v.* North Mo. R. R. 24 Mo. 493.

576. **The terms structure, erection, or improvement.** — The general lien laws in some of the states give a lien for labor done and materials furnished in the erection or alteration, not only of a house or other building, but so of any "structure," "erection," or "improvement" upon land.[1] Under these ambiguous terms it is of course possible to establish a lien for almost anything that can be attached to the realty. Accordingly, under such a statute, a lien has been established against a railroad for ties furnished the company;[2] and doubtless a lien might be established for almost any part of a railroad, such for instance as the grading of the line of road as an "improvement" upon land. The application of such statutes has not often been the subject of adjudication, because in nearly all the states there are now statutes which apply specifically to railroads, giving liens for labor performed and materials supplied in their construction and repair.

577. **Under a statute of Iowa, providing that a mechanic's lien for work and material shall attach from the commencement of "the building, erection, or other improvement,"** it has been held that a lien for railroad ties may be sustained against a mortgage made before such ties were furnished to the company or contracted for, in case the construction of the road had been commenced before the making of the mortgage, and was not then completed, although the person who furnished the ties and claimed the lien had nothing to do with the previous construction of the road.[3] In the case before the court, sixteen miles of road had been graded before the making of the mortgage, and the ties were, some months afterwards, furnished, apparently, to a

[1] As in ARKANSAS, "erection or other improvement," Dig. of Stat. 1874, §§ 4056–4062; TENNESSEE, "erection or improvement," Acts 1868, pp. 61–67; SOUTH CAROLINA, "structure," R. S. 1873, p. 550; DELAWARE, "house, building, or structure," Laws 1875, ch. 184, p. 308; KANSAS, "building, erection, or improvement," Dassler's Stats. 1876, § 3861; MISSISSIPPI, "buildings, bridge, or mill;" MICHIGAN, "building, wharf, machinery," Compiled Laws 1871, § 6789; Acts 1877, p. 145; IOWA, "erection or other improvement," Code 1873, §§ 2139–2141.

[2] Neilson *v.* Iowa Eastern Ry. Co. 44 Iowa, 71. The decision in this case is fully stated and examined in the following section. Other states have similar statutes.

[3] Neilson *v.* Iowa Eastern Ry. Co. 44 Iowa, 71. And see Taylor *v.* Burlington, Cedar Rapids & Minn. Ry. Co. in U. S. C. C. for District of Iowa, May Term, 1877, 11 West. Jur. 337; 4 Cent. L. J. 536; 4 Dill. 571. It must be confessed that, under this statute, or under this construction of it, a mortgage of an unfinished railroad is, in Iowa, a very poor security.

contractor who had undertaken to equip the road. Upon the first argument of the case before the Supreme Court, the lien was established against the road, subject to the mortgage;[1] but upon a reargument of the case, the lien was given priority of the mortgage, by reason of the terms of the statute, which was interpreted to mean something different from a statute providing that the lien shall attach only from the commencement of the work, or of the furnishing of the materials.[2] In the latter decision, in reply to the suggestion that it would be unjust to the mortgagee to make his mortgage subject to liens for work subsequently commenced, it is urged that a person who takes a mortgage upon a partially constructed building or other improvement has notice, from the condition of the property, of the possibility that mechanics' liens may attach upon it; that, although he cannot know the amount of the lien, or whether the work will be completed in pursuance of the plan of the mortgagor, according to which the work was commenced, yet, having elected to deal with the mortgagor, he may be required to rely upon his good faith and prudence; and that, although hardship might sometimes result from such a construction, yet the danger to be apprehended is not such as to control the construction of a statute having so little ambiguity. "In regard to the policy of the statute, as we construe it," say the court, "this may be said: it is not desirable that the execution of a mortgage upon land upon which a building or other improvement is in process of construction should arrest the work and prevent its completion. Both mortgagor and mortgagee are interested in its completion. Without it, the money already expended must, ordinarily, to a great extent, be lost. Take the present case as illustration. The intervenors are holders of mortgage bonds upon a road, sixteen miles of which had been graded at the time the mortgage was made. The value of their security depended upon the further construction of the road. They foresaw that work and materials must be furnished by somebody, or nothing could be realized from what had been done. Yet the construction of the statute which they contend for would

[1] Nelson *v.* Iowa Eastern Ry. Co. 8 Am. Ry. Rep. 82.

[2] Code 1873, § 2139, provides that such liens "shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection, or improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection, or improvement." See § 591.

require the mortgagor to keep a fund on hand for the daily payment of the laborers and material-men, or that the work and materials should be furnished practically without security."

The construction of this statute adopted by the court proceeds upon the ground that a railroad is an entirety; so that, if the work of construction of any portion of the road has been commenced before the execution of the mortgage, it does not matter that the particular work for which the lien is claimed was done, or the materials furnished, for some other portion of the road, and after the execution of the mortgage. The claim relates back to the commencement of the work.[1]

This same statute even provides for giving priority to a lien for labor or materials over a mortgage executed before the commencement of the "building, erection, or other improvement." The lien attaches in preference to any prior mortgage; "and any person enforcing such lien may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter."[2] The relative rights of a mortgagee of a railroad and a mechanic, in this case, would be that the mortgagee would retain his priority as to the land; but the mechanic would have priority over the mortgagee as to the buildings, erections, or improvements put upon the land subsequent to the mortgage, and might enforce his lien upon the building or other independent structure, by causing it to be sold and removed.[3]

578. A further question has arisen under this statute as to the rights of the mortgagee and the mechanic, when repairs are made upon a structure already completed, which, with the land, is covered by mortgage. The statute gives a lien for repairs; but when the lien attaches, and how it is to be enforced, are questions which have given the courts of Iowa much trouble.[4] This question came before the Circuit Court of the United States for the District of Iowa, in a foreclosure suit against the Burlington, Cedar Rapids, and Minnesota Railway Company, upon a petition of a firm of bridge-makers, to establish

[1] See § 591.

[2] Code 1873, § 2141.

[3] Taylor *v.* Burlington, Cedar Rapids & Minn. Ry. Co. *supra*, per Dillon, J. And see Getchell *v.* Allen, 34 Iowa, 559.

[4] Neilson *v.* Iowa Eastern Ry. Co. *supra*; Getchell *v.* Allen, *supra*.

a lien for one span of a bridge furnished this road after it had been fully completed and was in operation.[1] A portion of a bridge had been broken down or carried away by high water, and the span for which a lien was claimed was to replace this. The court held that any lien which could be claimed would be subject to the mortgage. Judge Dillon, delivering the opinion of the court, said: "As against the owner, the lien attaches from the time the repairs are begun. This is plain enough, and just. But when does this lien attach, as against a prior mortgagee of land and building? The answer is, at the same time it attaches as against the owner. The result is, that repairs on a previously completed building or railway, on which a mortgage rested prior to the commencement of such repairs, do not give a lien which will override the lien of the mortgage. The legislature has not authorized the owner of a building or railway, on which such owner has given a mortgage, to improve the mortgage out of existence, by making repairs *ad libitum*, and furnishing the owner the necessary credit therefor, by giving the mechanic and material-man a lien paramount to the mortgage. Such a view has neither law, justice, equity, nor public policy to recommend it."

The same rule is applicable in respect to any repairs made upon a mortgaged railroad already completed and in operation, such as the laying of new steel or iron rails. There is a lien for such repairs, but it is subject to the lien of the mortgage.[2]

It would seem that there could be no mechanics' lien upon a railroad for cars furnished for use upon it.[3]

II. *Special Lien Laws applicable to Railroads.*

579. It is within the legitimate scope of legislative power to provide that laborers and contractors may have a lien for labor performed and for materials furnished in the construction or improvement of a railroad in preference to all mortgages or

[1] Taylor *v.* Burlington, Cedar Rapids & Minn. Ry. Co. 11 West. Jur. 337; 4 Dill. 570. Judge Dillon, in this case, remarked that there were probably forty intervening petitions filed in the various railway foreclosure cases pending at that time, in that court, seeking to establish, on behalf of claimants, mechanics' liens upon the property covered by the railway mortgages.

[2] Taylor *v.* Burlington, Cedar Rapids & Minn. Ry. Co. *supra*.

[3] See New England Car Spring Co. *v.* Baltimore & Ohio R. R. Co. 11 Md. 81; Taylor *v.* Burlington, Cedar Rapids & Minn. Ry. Co. 11 West. Jur. 337; 4 Cent. L. J. 536.

other incumbrances placed upon the property subsequent to the passage of the act. The statute of the State of Missouri to this effect was held by the Circuit Court of the United States to be constitutional, and to give priority to such claims over a mortgage executed just after the passage of the act; the phrase "subsequent to the passage of this act" being interpreted to mean subsequent to the approval of it by the governor, and not subsequent to the expiration of ninety days from the passage of the act, at which time by general law every act takes effect, unless a different time is therein appointed.[1]

580. **Who is a laborer.** — A general agent or superintendent of a corporation employed at a stipulated salary is not entitled to the benefit of a lien in favor of mechanics, builders, lumbermen, artisans, workmen, laborers, or other persons who may perform any work upon or furnish materials for any building. Such an agent or superintendent stands in the place of the corporation itself toward others intended to be protected by the law.[2] Nor is a contractor who agrees to build a railroad, or to furnish the labor of others, a laborer or servant;[3] nor is the secretary of a corporation a laborer or servant;[4] nor is a consulting engineer a laborer or operative;[5] nor is a civil engineer a laborer or workman;[6] nor is a time-keeper and superintendent in the employ of a contractor a laborer;[7] nor is a sub-contractor an employee.[8]

581. **The right conferred by a lien in favor of laborers is personal,** and cannot be availed of by one who furnishes labor. Under the statute of New Jersey,[9] giving to the laborers in the employ of any corporation, in case of its insolvency, a lien upon its assets for the amount of wages due them, it is held that the right conferred is personal, inhering alone in the person who actually performs labor or service, and not in one who furnishes

[1] Walker *v.* Miss. Valley & Western R. R. Co. 2 Cent. L. J. 481.

[2] Smallhouse *v.* Kt. & Mon. Gold & Silver Mining Co. 2 Mon. T. 443; Blakey *v.* Blakey, 27 Mo. 39.

[3] Balch *v.* N. Y. & Oswego Midland R. R. Co. 46 N. Y. 521; Aikin *v.* Wasson, 24 N. Y. 482.

[4] Coffin *v.* Reynolds, 37 N. Y. 640.

[5] Ericsson *v.* Brown, 38 Barb. (N. Y.) 390.

[6] Pennsylvania & Del. R. R. Co. *v.* Leuffer, 84 Pa. St. 168.

[7] Missouri, Kans. & Tex. Ry. Co. *v.* Baker, 14 Kans. 563.

[8] Ney *v.* Dubuque, &c. R. R. Co. 20 Iowa, 347.

[9] Rev. Sts. 1877, p. 188.

the labor of others under a contract. Thus one who has contracted with a railroad company, whose road is located in New Jersey and has its terminus at Jersey City, to transfer by his own teams or drays over the company's ferry all freight received in New York for transportation over the road, and all freight received in Jersey City to be delivered in New York, is not an employee entitled to such lien, but a contractor.[1] "I think it very plain," said the vice chancellor, "the legislature did not intend to give a lien or preference for wages due for vicarious labor or service, or to confer upon one person the power to depute or delegate to himself the labor of many others, so that he can be an employee of a corporation to the extent of one hundred or one thousand men daily. Such a purpose would have been expressed by giving preference to the debt, as that all debts due for labor or service should be a lien, and not to the creditor, as it now stands, that the employees in the employ of a corporation shall have a lien upon its assets for the wages due to them respectively." Moreover the obvious purpose of the statute was in the first place to render it certain that the laborers whose services are essential to the continued operation of a railroad or like enterprise should be paid in any event, so that there should not be even a temporary suspension of the business; and in the second place to protect a class of persons who are dependent upon their wages for support, and who are unable to protect themselves against the misfortune or fraud of the company. The preference given by the statute grows out of the character of the creditor, and not out of the character of the debt.

582. No lien can be claimed for money advanced to laborers at the request of a railroad company. Thus, if certificates of indebtedness issued by a railroad company to its laborers for work are taken up by a third person, at the request of the company and on its agreement to settle with him for the same, he is entitled to recover of the company for money advanced; but he cannot claim a lien for goods and supplies furnished necessary for the operation of its road, under contract therefor. The fact that the certificates were issued to enable the laborers to procure board, and to enable boarding-house keepers to obtain groceries and provisions for hands engaged in the construction of the road does not

[1] Lehigh Coal & Navigation Co. *v.* Central R. R. Co. of N. J. 29 N. J. Eq. 252.

enable one who has advanced money to take up such certificates to claim that he has supplied goods under contract necessary for the operation of the road. The statute embraces materials used, supplies furnished, and labor performed, in constructing, repairing, operating, or maintaining a railroad; but not money loaned to the company or paid to its creditors at its request. A person advancing money upon such certificates cannot stand in the place of the former holders in respect to their lien, because the lien is not assignable at law.[1]

III. *Statutes of the several States giving Liens upon Railroads.*

In a great majority of the states there are now statutes giving liens specifically upon railroads for labor performed and materials supplied in their construction or operation. These statutes are so diverse in their operation, and have a bearing so important upon the value of the securities issued by companies whose roads are subject to these laws, that it is deemed best to give the leading provisions of these statutes in full.

583. Alabama.[2] — Under the general lien law any person performing any work upon or furnishing any material, fixtures, engine, boiler, or machinery for any building, erection, or improvement upon land, under any contract with the owner or his contractor or sub-contractor, has a lien for the same, in preference to all other incumbrances which may attach subsequently to the commencement of such buildings or improvements. Such lien attaches to the buildings, erections, or improvements only, in preference to any prior lien, incumbrance, or mortgage upon the land; and any person enforcing such lien, where there is a prior mortgage or lien upon the land, may have such building, erection, or improvement sold under execution, and the purchaser may remove the same within a reasonable time. Every original contractor within six months, and every day laborer within thirty days, and every other person within four months, after the indebtedness has accrued, must file a statement of the demand with the judge of probate of the county.

A lien is also created [3] in favor of laborers and employees of

[1] Cairo & Vincennes R. R. Co. *v.* Fackney, 78 Ill. 116.

[2] Code 1876, pp. 777–782, §§ 3440–3461.

[3] Code 1876, § 3481; Act March 19, 1875.

any railroad company operated in the state, except the officers of said companies, for all debts due to them for work and labor done and performed by them for such railroad company; and such lien extends to all the property, rights, effects, and credits of every description of such railroad company situated in this state.

584. California.[1] — Every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of any building, bridge, railroad, or any other structure, has a lien upon the same for work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, sub-contractor, architect, builder, or other person having charge of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter. The liens are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance, of which the lien-holder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished.

Under a similar statute a lien for work or materials could not be acquired on a portion of the road, but must be filed on the entire road. One contractor or sub-contractor cannot file a lien for the part of the road upon which he worked or for which he furnished material, so that while one might acquire a lien upon a bridge, another might have a lien upon a tunnel, and a third upon a culvert. Neither does the statute contemplate that there may be a separate lien upon each mile or section of the road.[2]

585. Colorado.[3] — All mechanics, laborers, and others who perform work or labor or furnish materials to the amount of twenty-five dollars or more, for the construction or repairing of

[1] Codes and Statutes 1876, vol. 2, §§ 11,183, 11,186; Approved March 30, 1874.

[2] Cox *v.* Western Pacific R. R. Co. 44 Cal. 18; *S. C.* 47 Ib. 87.

[3] Gen. Laws 1877, pp. 588, 591.

any railroad, tram-way, toll-road, or canal, have a lien upon such railroad, tram-way, toll-road, or canal, for the amount and value of the work or labor so performed, or material furnished, by filing in the county clerk and recorder's office of the county in which the property to be charged with such lien is situated, within forty days after such railroad, tram-way, toll-road, or canal shall have been completed, a statement of such lien; or if such lien is claimed by a sub-contractor, journeyman, or any other person than a contractor performing work or labor, or furnishing materials, then by filing such statement within twenty days after the time when the last work or labor was performed, or the last materials were furnished by him, and by serving a copy of such statement upon the owner or owners of such property, or the agents of such owner or owners. Any lien so claimed extends to and includes all franchises, charter privileges, and rights of way that may anywise pertain to any such railroad, tram-way, toll-road, or canal. The land occupied by any building or superstructure, railroad, tram-way, toll-road, or canal, necessary for the convenient use and occupation of the same, is subject to the liens provided for, if at the time the work or labor was commenced, or the first materials were furnished, such land was owned by, or was in the possession of, under a *bonâ fide* claim of title, the person or persons for whom, or at whose instance, such work or labor was performed, or materials were furnished; but if such person hold less than a fee simple estate in such land, then only his or their interest therein is subject to such lien. The liens provided for are preferred to every other lien or incumbrance which shall attach upon any property made subject thereto subsequent to the time when the labor or work was commenced, or the first of the materials were furnished, and also to all mortgages and other incumbrances unrecorded at the time such work or labor was commenced, or the first of the materials were furnished; but any valid incumbrance upon any such land duly made and recorded before such work or labor was commenced, or the first of such materials were furnished, remains unimpaired.

586. In Connecticut[1] every railroad for the construction of which, or of any of its appurtenances, any person shall have a claim for materials furnished or services rendered, under any con-

[1] G. S. 1875, pp. 360, 361; Act 1871, ch. 137.

tract with or approved by the corporation owning or managing such road, is subject with its real estate, right of way, material, equipment, rolling stock, and franchise, to the payment of such claim; such claim takes precedence of any other incumbrance originating after the commencement of such services or the furnishing of such materials. A certificate of the lien must, within sixty days after the performance of such services, or the furnishing of such materials has ceased, be filed in the office of the secretary of state in a book kept for the purpose.

The general lien law of the state extends only to services rendered or materials furnished in constructing or repairing a building.[1] This statute, however, applies to buildings of a railroad company.[2] It was contended in one case, in behalf of a railroad company, that the statute could not apply to railroads or other enterprises of a public character; that railroad companies are public corporations, created by positive statute for public use; and that the easement in the soil is taken by the public in the exercise of the right of *eminent domain;* and therefore the exercise of a mechanic's lien is incompatible with the public rights in the property, and inconsistent with the objects of the corporation. But the court said that if it be granted that the easement in the soil is in such case taken in the exercise of the right of eminent domain, it by no means follows that the soil is so taken with an immunity from all liens and incumbrances upon it, or with an immunity from liens that may afterwards be put upon it under the general lien law.[3] The fact that the legislature subsequently enacted a special lien law in favor of contractors as against railroad companies was regarded as giving countenance to the view that the general lien law was intended to apply to those corporations.

587. Dakota Territory.[4] — Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for any building, erection, or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the

[1] G. S. 1875, p. 359, § 9; Statute of 1855.

[2] Botsford *v.* New Haven, Middletown & Willimantic R. R. Co. 41 Conn. 454.

[3] Without the question being raised, such a lien was enforced upon a passenger station in Danbury, in the case of Benedict *v.* Danbury & Norwalk R. R. Co. 24 Conn. 320.

[4] R. C. 1877, pp. 622, 624, §§ 655, 656, 664, 665, 666, of Code of Civil Procedure.

owner, his agent, trustee, contractor, or sub-contractor, has a lien upon such building, erection, or improvement, and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished. Every sub-contractor wishing to avail himself of the benefits of this lien must give notice to the owner, his agent, or trustee, before or at the time he furnishes any of the things aforesaid or performs any labor, of his intention to perform the same, and the probable value thereof. The liens for labor done or things furnished are preferred to all other liens and incumbrances which may be attached to or upon said building, erection, or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection, or other improvement.

The entire land upon which any such building, erection, or other improvement is situated, including that portion of the same not covered therewith, is subject to all liens so created, to the extent of all the right, title, and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or things furnished. The lien attaches to the buildings, erections, or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

588. Georgia.[1] — All contractors to build railroads have a special lien upon the road for work done and materials furnished therefor. The lien must be recorded, within three months after the completion of the work, in the office of the clerk of the Superior Court. Such lien is inferior to other general liens, when actual notice of such liens have been communicated before the work was done or materials furnished, but is superior to all other liens. Persons who contract with a railroad in the capacity of mechanics have a lien on the road for the work done, but not if they made the contract in the capacity of contractors.[2]

In all cases where the business of any corporation operating a

[1] Code 1873, §§ 1979, 1980; Laws 1874, p. 45.

[2] Savannah, Griffin & North Ala. R. R. Co. *v.* Grant, 56 Ga. 68.

railroad, either wholly or partially in this state, shall, by an order or decree of any court, be placed in the hands of a receiver for the benefit of the creditors or stockholders of such corporation,[1] it shall be the duty of said receiver to apply the income of said railroad to the payment of the incidental expenses necessary to the carrying on said business, which shall include the wages of employees, wood, cross-ties, and other material furnished, and which may be necessary for conducting said business, and keeping the property in repair, and the damages which may arise from the loss or injury to goods, wares, and merchandise received by said road for transportation, and for injuries to persons and property caused by the running of the cars on said road, and for which said road is made liable, as common carriers, by the laws of this state; and a lien is accordingly created on the gross income of said road, while in the hands of such receiver, in favor of such creditors or claimants, superior to all other liens under the laws of this state. If the receiver be removed, or a vacancy occur in the office, and a successor be appointed, it is made his duty to pay the liens so provided for, according to their date, out of any funds in his hands as such receiver, whether such liability accrued before or after his appointment.

589. Illinois.[2] — All persons who furnish to any railroad corporation, under the laws of this state, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation, or repair of such roads, by contract with said corporation, or who do and perform any work or labor for such construction, maintenance, operation, or repair by like contract, are entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same have a lien upon all the property, real, personal, and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor. Suit must be commenced within six months after such contractor or laborer shall have completed his contract with the railroad corporation, or after such labor shall have been performed or material furnished.

[1] Laws 1876, p. 122, §§ 1, 2.

[2] R. S. 1877, p. 671; Act of April 3, 1872.

A sub-contractor, material-man, or laborer, who furnishes to any contractor with any such railroad corporation any fuel, ties, materials, supplies, or any other article or thing, or who performs any work or labor for such contractor in conformity with any terms of any contract, express or implied, which such contractor may have made with any such railroad corporation, has a lien upon all the property, real, personal, and mixed, of said railroad corporation. No such lien takes priority over any existing lien. The person performing such labor, or furnishing such material, must cause a notice, in writing, of his intention to claim a lien, to be served on the president or secretary of such railroad corporation.

This act giving sub-contractors a lien upon railroads for labor and materials furnished relates only to labor and materials furnished after its passage.[1] Under the previous act[2] no one was entitled to a lien unless his contract was directly with the railroad company.[3] A sub-contractor is not, under the present law, entitled to a lien on a railroad, unless he complies with the statute in regard to giving notice.[4]

Under the railroad lien law of Illinois there is no lien in favor of any one who may have done labor for or furnished materials or supplies to sub-contractors. The statute having no apt words to extend the liens given beyond sub-contractors, the court has no right by judicial construction to extend the meaning of the act beyond the intention plainly expressed. No lien exists against a railroad in favor of remote contractors.[5]

590. Indiana.[6] — The employees of any corporation doing business in this state, whether organized under the laws of the state or otherwise, are entitled to have and hold a first and prior lien upon the corporate property of such corporation, and the earnings thereof, for all work and labor done and performed by such employees for such corporation, from the date of their employment by such corporation, which lien is prior to any and all liens

[1] R. S. 1874, p. 671, § 52.

[2] February 22, 1861.

[3] Arbuckle *v.* Ill. Midland Ry. Co. 81 Ill. 429.

[4] Cairo & St. Louis R. R. Co. *v.* Cauble, 85 Ill. 555.

[5] Cairo & St. Louis R. R. Co. *v.* Watson, 85 Ill. 531; 11 Chicago Leg. News, 141; *S. C.* 5 Reporter, 261; and see Rothgerber *v.* Dupuy, 64 Ill. 452; Ahern *v.* Evans, 66 Ill. 125; Newhall *v.* Kastens, 70 Ill. 156.

[6] Acts Special Session 1877, ch. 9, p. 27. For former statute, see 1 R. S. 1876, p. 709.

created or acquired subsequent to the date of the employment of such employees by such corporation. Any employee wishing to acquire such lien upon the corporate property of any corporation, or the earnings thereof, whether his claim be due or not, must file in the recorder's office of the county, where such corporation is located or doing business, notice of his intention to hold a lien upon such property and earnings aforesaid, for the amount of his claim, setting forth the date of such employment, the name of the corporation, and the amount of such claim; and the lien so created relates to the time when such employee was employed by such corporation, or to any subsequent date during such employment, at the election of such employee, and has priority over all liens suffered or created thereafter, except other employees' liens, over which there is no such priority.

Any employee having acquired such lien may enforce the same by filing his complaint therefor in the Circuit or Superior Court in any county where such lien was acquired, at any time within six months from the date of acquiring such lien, or if a credit be given, from the date of such credit, and the court rendering judgment for such claim shall declare the same a lien upon such property, and order the same sold to pay and satisfy such judgment and cost.

591. Iowa.[1] — Every mechanic or other person who does any labor upon, or furnishes any materials, machinery, or fixtures for any building, erection, or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor, or sub-contractor, upon complying with the provisions of the statute, has, for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished.

And when such material has been furnished, or labor performed, in the construction, repair, or equipment of any railroad, canal, viaduct, or other similar improvement, the lien therefor extends and attaches to the erection, excavations, embankments, bridges,

[1] Laws 1876, ch. 100. The first paragraphs are the same as in the previous statute. Code 1873, title 14, ch. 8, first enacted April 3, 1860.

road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging; all of which, except the easement or right of way, constitutes the building, erection, or improvement provided and mentioned in this statute.

An account or statement of the lien must be filed with the clerk of the District Court of the county, verified by affidavit. A principal contractor must file such statement within ninety days from the date on which the last material was furnished, or the last labor was performed; and when the lien is claimed on a railroad, a sub-contractor has sixty days from the last day of the month in which the labor was done, or material furnished, within which to file his claim.

Such liens are preferred to all other liens and incumbrances which may be attached to or upon such building, erection, or other improvements, or either of them, and to the land upon which they are situated, made subsequent to the commencement of said building, erection, or other improvement.[1] These liens attach to the buildings, erections, or improvements for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which such erection, building, or improvement belongs, or is erected or put. If such material was furnished, or labor performed, in the erection or construction of an original and independent building, erection, or other improvement commenced since the attaching or execution of such prior lien, incumbrance, or mortgage, the court may, in its discretion, order and direct such building, erection, or improvement to be separately sold under execution, and the purchaser may remove it within such reasonable time as the court may fix. But if, in the discretion of the court, such building or improvement should not be separately sold, the court takes an account and ascertains the separate values of the land, and the erection, building, or other improvement, and distributes the proceeds of sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building, erection, or other im-

[1] See § 577. The contract is regarded as entire, and where there is a continuous open account, the cause of action is deemed to have accrued as to all the items on the day of the last; and therefore the time for notice expires ninety days from the date of the conclusion of the work. Jones *v.* Swan, 21 Iowa, 181; Delaware Construction Co. *v.* Davenport & St. Paul Ry. Co. 46 Iowa, 406.

provement. If the material furnished, or labor performed, was for additions to, repairs of, or betterments upon buildings, erections, or other improvements, the court takes an account of the values before such material was furnished, or labor performed, and the enhanced value caused by such additions, repairs, or betterments, and upon the sale of the premises distributes the proceeds of sale so as to secure the prior mortgage or lien priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lien priority upon the enhanced value caused by such additions, repairs, or betterments. In case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds are applied on the prior mortgage or other lien.

It is also provided that a judgment against any railway corporation for any injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862, the time when the original statute went into effect.[1] Under this statute, the purchaser of railroad bonds secured by mortgage is required to take notice that his lien, although prior in time, must be postponed to judgments for injuries to persons or property occurring at any time after the execution of the mortgage, so long as the property is in the possession of the company. But the right of action is not a lien, nor is an action pending a lien. The lien does not attach until a judgment is rendered. Therefore, if the mortgaged property be sold under a decree of foreclosure before judgment is recovered, the company has then no title to the property, and no lien can attach to it. There is nothing in the statute charging a purchaser at the foreclosure sale with notice of the action, or making the claim at the time of the injury or at the time of commencing the action a lien upon the company's property. The action is purely personal. Until judgment is rendered, any one may purchase the company's property unaffected by the action.[2]

592. Kansas.[3] — Whenever any railroad company contracts

[1] Code 1873, § 1309.

[2] Burlington, Cedar Rapids & Northern R. R. Co. 7 Cent. L. J. 65.

[3] Laws 1872, ch. 136, § 1; 2 Dassler's Stat. 1876, § 4610.

with any person for the construction of its road or any part thereof, such railroad company is required to take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay to laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind, all just debts incurred in carrying on such work, due to such persons, or to any person to whom any part of such work is given, which bond shall be filed by such railroad company in the office of the register of deeds in each county where the work of such contractor shall be; and if any such railroad company shall fail to take such bond, such railroad company is liable to the persons before mentioned to the full extent of all such debts so contracted by such contractor.

Under this statute the company rather than the laborers and mechanics is the proper obligee. The liability of a railroad company in such case is purely statutory, and a party seeking to enforce the liability must show all the facts required by the statute. If the bond contains all the conditions provided for, it is not vitiated by an additional stipulation to save the company harmless from all trouble, damage, costs, suits, by reason of the debts.[1] A railroad company failing to take the bond required is liable not merely to the laborers personally, but to any persons to whom they may transfer their claims.[2]

This statute applies not merely when a railroad company is engaged in the construction of its first and main track, but also whenever it is enlarging its road by the addition of side tracks.[3]

593. Kentucky.[4] — A lien is given in favor of any person who performs labor or furnishes materials for the erection, altering, or repairing of a house, building, or other structure, or the improvement in any manner of real estate by contract with the owner. When the labor is done for a contractor or sub-contractor no lien attaches, unless notice in writing be given to the owner that a lien will be claimed. The lien is dissolved unless the claimant, within sixty days after he ceases to labor or furnish materials, files a statement in the office of the clerk of the county court of

[1] Atchison, Topeka & Santa Fé R. R. Co. 14 Kans. 212.

[2] Missouri, Kansas & Texas Ry. Co. *v.* Brown, 14 Kans. 557.

[3] Missouri, Kansas & Texas Ry. Co. *v.* Brown, *supra*.

[4] Gen. Stats. 1873, ch. 70, pp. 620–624.

the county. The lien is not effectual against a *bonâ fide* purchaser for value without notice, actual or constructive.[1]

When the property or effects of any railroad company [2] are assigned for the benefit of creditors, or come into the hands of any receiver of a court, trustee, or assignee, for the benefit of creditors, or anywise come to be distributed among creditors, whether by operation of law or by the act of such company, owner, or operator, the employees of such company, owner, or operator in such business, and the persons who have supplied materials or supplies for the carrying on of such business, have a lien upon so much of such property and effects as may have been embarked in such business, and all the accessories connected therewith, including the interest of such company, owner, or operator in the real estate used in carrying on such business.

This lien is superior to the lien of any mortgage or other incumbrance, and exists for the whole amount due such employees as such, or due for such materials and supplies. No president or other chief officer, nor any director or stockholder of any such company, is deemed an employee within the meaning of this act.

When the trustee or other person having the administration or distribution of such property or effects continues the operation of the business, it is his duty, at the end of each calendar month, after payment of current expenses, and after payment of any debt due the United States or the State of Kentucky, to distribute the remaining money in his hands among the persons to whom this lien is given *pro rata*, except twenty per cent. thereof, which he may, if necessary, reserve for contingent expenses.

All persons whose property has been injured by the carelessness of a railroad company or its employees have a like lien for the recovery of damages for such injury, and the statute of limitations for such injuries is the same against a railroad company as that provided against natural persons.

Whenever a railroad is sold or taken into possession by any court of equity, or other court having jurisdiction, the wages due to employees by said corporation, for work done within three months next before such sale or seizure, and claims for compensa-

[1] A mortgagee is entitled to the rights of a purchaser under this act. Gere *v.* Cushing, 5 Bush (Ky.), 304.

[2] Laws 1876, ch. 902.

tion for injuries to persons or property inflicted in operating said railroad, within six months next before such sale or seizure, are a first lien and must be first paid from the proceeds of sale, or of net earnings of the railroad while in possession of the court.[1]

594. In Maine[2] it is provided that every railroad company, in making contracts for the building of its road, shall require sufficient security from the contractors for the payment of all labor thereafter performed in constructing the road by persons in their employ; and such company shall be liable to the laborers employed for labor actually performed on the road, if they, within twenty days after the completion of such labor, shall, in writing, notify its treasurer that they have not been paid by the contractors.

595. Maryland. — The general lien law applies to buildings only. Coal cars were held not to be subjects of a mechanic's lien under a statute which provided that every machine erected, constructed, or repaired should be subject to a lien in like manner with buildings; even admitting that coal cars could be called machines, the statute was construed to apply only to fixed or stationary machinery.[3] Such a statute is to be construed with reference to the general purpose of lien laws in favor of mechanics. By the common law mechanics who erected a house or stationary machinery lost all claim upon the property as soon as it became fixed to the realty; and the lien provided by statute was designed to obviate the insecurity arising from the vesting of the title in the owner of the realty without any voluntary delivery of the property by the mechanics who had done the work and furnished the materials for the additions to the realty. But the reason of the law does not apply to movable machines. With reference to these the law affords ample and complete security to the mechanic by leaving in him the right of property, or in the case of repairs done, giving him a lien thereon while they remain in his possession; and he has the right to retain the possession and his right of property or his lien, until his claim for construction or repair is paid.

[1] Laws 1876, ch. 319.

[2] Acts 1877, ch. 186.

[3] New England Car Spring Co. *v.* Baltimore & Ohio R. R. Co. 11 Md. 81.

596. In Massachusetts[1] any person to whom a debt is due for labor performed or for materials furnished and actually used in constructing any railroad by virtue of an agreement with the owner of such railroad, or with any person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials, has a right of action against the owner of such railroad to recover such debt with costs; provided that no one shall have an action for labor performed unless he shall, within thirty days after ceasing to perform such labor, serve on the owner of the railroad a written statement under oath of the amount of the debt, and of the name of the person for whom and by whose employment the labor was performed, by causing such statement to be filed in the office of the clerk of the city or town where the labor may have been performed; and provided that no one shall have a right of action for materials furnished unless before beginning to furnish the same he shall have served written notice of his intention to claim such right in the same manner. No contractor for the whole or any part of such railroad can have such right of action, unless his contract is with the owner of the railroad. Action must be commenced within sixty days after the claimant has ceased to perform the labor or furnish the materials.

This statute applies to a person performing labor under an agreement with a contractor, who acts under a contract with the owner of the railroad. While sub-contractors have no right of action under this statute, persons employed by them or furnishing them materials are protected.[2]

This statute does not afford any remedy to a person to whom a debt is due for labor performed in constructing a railroad, by virtue of an agreement with a contractor whose contract with the owner of the railroad was made before the passage of the statute, although the labor was performed after the statute took effect.[3]

597. Michigan.[4] — It is lawful for all railroad companies, when contracts are made by them with any contractors for work, labor, or materials to be used in repairing or constructing railroads, to provide in the contracts for the payment of laborers and persons furnishing material to such contractors or to sub-con-

[1] Acts of 1873, ch. 353.

[2] Hart *v.* Boston, Revere Beach & Lynn R. R. Co. 121 Mass. 510.

[3] Parker *v.* Mass. R. R. Co. 115 Mass. 580.

[4] Compiled Laws 1871, pp. 786, 787.

tractors; and if no such provision is made, it is lawful for the railroad companies to withhold payment until such laborers and persons furnishing material are paid; and it is the duty of such railroad companies, by agent or otherwise, at each pay-day, to see that all laborers and persons furnishing material employed by any such contractors or sub-contractors are paid before payment is made to such contractors, not to exceed, however, the amount due to the contractors. The provisions of this act do not apply to any iron or other materials and property used in ironing and equipping the railroad. A bill of items of the material and labor furnished to such contractor or sub-contractors shall be furnished to the company through their agent, or otherwise, together with the amount claimed prior to the usual pay-day of said company, when such claim shall be due, or in case the said contractors are not then paid, then prior to the payment then due. On compliance with the provisions of this act, the persons performing the labor, or furnishing the materials, have the right to collect pay for the same from the railroad companies by action, as in case of other claims against such railroad companies, if the said claim or claims are undisputed and acknowledged to be due from said contractor or sub-contractor.

All the stockholders of any such company are individually liable for all the labor performed,[1] but they are not liable to an action therefor until an execution shall be returned unsatisfied, in whole or in part, against the corporation, and the amount due on such execution shall be *primâ facie* evidence of the amount recoverable with cost against any such stockholder; and every stockholder against whom any such recovery for labor, ties, wood, and supplies shall have been had, has the right to recover the same of the other stockholders of the corporation, in ratable proportion to the amount of stock they shall respectively hold.[2]

598. Minnesota.[3] — Whenever any railroad company contracts with any person for the construction or repairing of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond with sureties, conditioned that such person shall pay all la-

[1] Const. 1850, art. xv. § 7.

[2] Compiled Laws 1871, p. 580; Laws 1873, p. 540.

[3] Laws 1873, ch. 29, §§ 1, 2, 3; 1 Stats. at Large 1873, p. 436.

borers and mechanics all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on such work, which bond or a certified copy thereof shall be filed by said railroad company, in the office of the register of deeds in each county where the work of such contractor shall be. All persons to whom such contractor shall be indebted for work as aforesaid, and every railroad company which shall have paid any debt, claim, or demand, as provided by this act, shall have an action on said bond, to the full amount of debts awarded against such contractors. And if any such railroad company shall fail to take and file such bonds, or if any contractor or sub-contractor shall be indebted for work or services as aforesaid, said railroad company shall be liable to the persons mentioned to the full extent of all such debts so contracted. Such laborers or mechanics or other persons shall give the notice and take the action prescribed in this act. Whenever any person, being contractor or sub-contractor, employed by or in pursuance of the terms of any contract with any railroad company for the construction or repairing of any portion of any railroad, shall be indebted to any laborer or mechanic for services rendered, such railroad company shall be liable to pay such laborer or mechanic the amount of such debt, provided such laborer or mechanic shall have given notice to such railroad company within thirty days after such debt shall have accrued that he has such debt, and provided such debt shall have accrued within sixty days prior to the giving of such notice. Such notice shall be in writing, and shall specify the particular nature and amount of such debt, claim, or demand, and shall be delivered to the secretary or chief engineer in charge of the construction or repairing of that portion of the road upon which such labor was performed, either personally, or by leaving the same at the office or usual place of business of such secretary or engineer. No action shall be maintained against any railroad company under the provisions of this act, unless the same is commenced within sixty days after the service of notice aforesaid.

599. Missouri.[1] — All persons who shall do any work or labor in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges, or culverts of any railroad company incorporated under the laws of this state, or owning or operating a

[1] Laws 1873, pp. 58, 59; Myer's Supplement to Wagner's Stats. 1877, p. 76.

railroad within this state, and all persons who shall furnish ties, fuel, bridges, or materials to such railroad company shall have, for the work done and labor performed, and for the materials furnished, a lien upon the road-bed, station-houses, depots, bridges, rolling stock, real estate, and improvements of such railroad, upon complying with the provisions hereinafter mentioned; provided such work and labor is performed, and such materials are furnished, under and in pursuance of a contract with such railroad company, its agents, contractors, sub-contractors, lessees, trustees, or construction company organized for the uses and purposes of such railroad company, or having in charge the building, construction, or improvement of such railroad, or any part thereof.

This lien attaches to the buildings, erections, improvements, road-bed, and property mentioned, from the date of the commencement of such work and labor, or from the time such materials were furnished or delivered, and is prior to all mortgages or incumbrances placed upon the property affected by this lien subsequent to the passage of this act.

It is the duty of all persons claiming the benefit of such lien, within ninety days next after the completion of the work, or after the materials were furnished, to file in the office of the circuit clerk of any county through which said railroad is located a just and true account of the amount due, after all just credits have been given, which account shall state the amount claimed as due, the general nature of the work, amount of labor performed, or of materials furnished; the dates when the work was done, and when materials were furnished, and the place or places at which said labor and work was performed, or said materials were furnished; the name or names of the parties with whom the contract for said work or furnishing said materials was made, and also the name of the railroad against which said lien is intended to apply; and it is the duty of all persons claiming said lien, within said ninety days, to serve a copy of the above account on the person or corporation owning or operating, or having charge of said road, or of the property to which said lien attaches.

All railroad companies and other corporations[1] are required to make payment to their employees and other operatives of the wages due for all labor and services performed by them, within three months next preceding a demand made therefor, not ex-

[1] Laws 1877, pp. 348, 349; Myer's Supplement to Wagner's Stats. 1877, p. 79.

ceeding sixty dollars, in preference to any other claim, debts, or demands whatsoever, not secured by specific liens on property, and such priority of payment may be enforced by civil action; and payments of wages are required to be made on or before the fifteenth day of each month, for the full amount of all wages earned previous to the first day of that month, with interest at six per centum, if not paid, to be added to the amount of such wages when paid or recovered by suit. All debts due employees or operatives for wages of their labor have priority of payment from the money and assets of the corporations in the hands of officers or agents, or of any receiver or assignee, over every other claim not specifically secured. Every corporation, officer, agent, receiver, assignee, or person holding money or assets, refusing to recognize the priority of employees' claims, is liable to such employees for the amount of all loss and damages occasioned by his unlawfully withholding the money.

Whenever any contractor for the construction of any part of a railroad[1] which is in process of construction, or any contractor for repairing any part of a railroad, shall be indebted to any sub-contractor, laborer, or other person who shall perform any labor upon or furnish any materials for such railroad, such sub-contractor or laborer, or other person, may give notice of such indebtedness to the company; and said company shall thereupon become liable to pay such sub-contractor or laborer, or other person, the amount so due him for such labor or materials, and action may be maintained against said company therefor. Such notice shall be given within twenty days after the performance of the labor or work, or the delivery of the materials, for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the amount, description, and quantity of materials furnished, and the time when the said labor was performed, and the time when the said materials were furnished for which the claim is made, and the name of the contractor from whom due, and shall be signed by such sub-contractor, laborer, or other person, or his attorney, and shall be served on an engineer, agent, or other person employed by said company, having charge of the section of the road on which such labor was performed, or such material furnished, personally, or by leaving the same in the office or usual place of business of such engineer,

[1] Myer's Supplement 1877, p. 72, § 10; Laws 1873, p. 61.

agent, or person having charge, with some person over fifteen years of age; but no action shall be maintained against any company under these provisions, unless the same is commenced within ninety days after notice is given to the company as above provided.

A former statute[1] giving laborers a claim for thirty days' labor or less against a railroad company, upon giving notice to the company of their claim, applied to laborers employed by a sub-contractor.[2] Under such statute a notice that a contractor is in arrear, and that the laborer claims a certain sum as due to him, is sufficient. But the notice can be served only in the mode pointed out by statute, by service upon an engineer or agent of the company for the section of the road upon which the work was done. Evidence that the notice was given to the company without showing how it was given is insufficient.[3]

600. Nevada.[4] — Every person performing labor upon or furnishing material of the value of twenty-five dollars, to be used in the construction, alteration, or repairs of any building, railroad, tram-way, toll-road, canal, or any other structure, has a lien upon the same for the work or labor done, or materials furnished by each respectively, whether done or furnished at the instance of the owners of the building or other improvement or his agent; and every contractor, sub-contractor, architect, builder, or other persons having charge of the construction, alteration, or repairs, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner. The liens so provided for are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance, of which the lienholder had no notice, and which was unrecorded at the time of the

[1] Wagner's Stats. of Mo. p. 302, § 10.

[2] Grannahan *v.* Hannibal & St. Jo. R. R. Co. 30 Mo. 546; and see Peters *v.* St. Louis & Iron Mt. R. R. Co. 24 Mo. 586; *S. C.* 23 Mo. 107.

[3] Cosgrove *v.* Tebo & Neosho R. R. Co. 54 Mo. 495. "For these artificial entities have no eyes to see, ears to hear, nor hands to receive, and can only directly act, or be acted upon, through and by means of their agents and officers." Per Sherwood, J.

[4] Stat. 1875, ch. 64, §§ 1, 4.

building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished.

601. New Hampshire.[1] — Any person who shall, by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, in the grading, masonry, bridging, or track-laying of any railroad, under a contract with an agent, contractor, or sub-contractor of the proprietors thereof, by giving notice in writing to said proprietors, or the person having charge of said railroad, that he shall claim a lien for labor to be performed or materials to be furnished, shall have a lien upon said railroad, and the land upon which the same is constructed, which shall continue for sixty days after such labor is performed or materials furnished, and may be enforced by attachment, as provided by law in the case of a lien upon a house or other building or appurtenances.

602. New Jersey.[2] — As often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer for thirty or any less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company, and the company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor; such notice shall be given by such laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made; it must be in writing, and must state the amount and number of days' labor, and the time when the same was performed for which the claim is made, and the name of the contractor from whom due, and must be signed by such laborer or his attorney, and served on an engineer, agent, or superintendent employed by such company having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent, or superintendent, with some person of suitable age; but no action shall be maintained against any company under these provisions unless the same is commenced within thirty days after

[1] Laws 1871, ch. 1, § 3.

[2] R. S. 1877, p. 927, § 10; Acts 1877, p. 155, § 10.

notice is given to the company by such laborer. The liability of the company cannot exceed its liability to the contractor. Payments made to such laborers are a full discharge to the company from the contractor for the amount so paid.

Whenever a receiver is appointed over any railroad company,[1] the receiver is required to apply all unincumbered personal effects, and all moneys which may be transferred to him at the time of entering upon his duties as such receiver, toward the payment of wages at that time due the employees of such company; and the chancellor may from time to time make such orders as he may deem proper to equitably carry out the provisions of this section; provided, that no such payments shall be made for more than two months' wages.

In case of the insolvency of any corporation,[2] the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of the company; and the word "laborers" shall be construed to include all persons doing labor or service of whatever character for or as workmen or employees in the regular employ of such corporations.

603. New York.[3] — The provisions of the laws relating to mechanics' liens apply to bridges and trestle-work erected for railroads and materials furnished therefor, and labor performed in constructing said bridges, trestle-work, and other structures connected therewith; and the time within which said liens may be filed extends to ninety days from the time when the last work shall have been performed on said bridges, trestle-work, and structures connected therewith, or the time from which said materials shall have been delivered.

Any person who performs any labor for a railroad corporation, on filing with the county clerk of any county in which such railroad corporation is situated, or through which the road of such corporation passes, the notice hereafter mentioned, has a lien for the value of such labor upon such railroad track, rolling stock, and

[1] Laws 1874, ch. 27, § 2; 2 Rev. 1877, p. 943.

[2] 1 Rev. 1877, p. 188, § 63; 2 Ib. 1289, § 25.

[3] 3 Rev. Stat. 1875, p. 815, §§ 1, 3, 4, 7; and see 2 R. S. 1875, p. 565. Original Acts, Laws 1854, ch. 402; Laws 1870, ch. 529; the latter act extending the lien provided for in former act to railroad bridges, &c.

appurtenances, and upon the land upon which such railroad track and appurtenances are situated, to the extent of the right, title, and interest of such railroad corporation in the property existing at the time of filing the said notice. Within thirty days after the performance and completion of such labor, such person shall file a notice, in writing, with the county clerk of the county where the property is located, specifying the amount of claim, and the corporation against whom the claim is made.

Every lien created under the provisions of this act continues until the expiration of one year, unless sooner discharged by the court or some legal act of the claimant in the proceedings; but when a judgment is entered therein, and docketed with the county clerk within said year, it shall be a lien upon the real property of the railroad corporation against whom it is obtained, to the extent that other judgments are now made a lien thereon.

Under these acts laborers employed by a sub-contractor cannot establish a lien against the company unless they show that at the time of filing their notices the company was indebted to the principal contractor on its contract with him, and unless, moreover, they show that the principal contractor was then indebted to the sub-contractor.[1]

It is further provided, that as often as any contractor for the construction of any part of a railroad,[2] which is in progress of construction, shall be indebted to any laborer for thirty or any less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company; and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the month and particular days of the month upon which labor was performed and remains unpaid for, the price per day, the amount due, with the name of the contractor from whom due, the section of the road on which such labor was performed, and shall

[1] Sampson *v.* Buffalo, N. Y. & Philad. R. R. Co. 13 Hun (N. Y.), 280; 6 N. Y. Weekly Dig. 74. Statute 1850, ch. 140, § 12, applied to laborers employed by sub-contractors. Kent *v.* New York Cent. R. R. Co. 12 N. Y. 628.

[2] 2 R. S. 1875, p. 522.

be signed by such laborer or his attorney, to which notice an affidavit shall be annexed, made by such laborer or his attorney, to the effect that of his own knowledge the statements contained in such notice are in all respects true. Such notice so verified shall be served on an engineer, agent, or superintendent employed by said company having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company, under the provisions of this section, unless the same is commenced after ten and within thirty days after notice is given to the company by such laborer as above provided.

604. North Carolina.[1] — As often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer for thirty or any less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company, and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the time when the same was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney, and shall be served on an engineer, agent, or superintendent, employed by said company, having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within thirty days after notice is given to the company by such laborer as above provided.

605. Ohio. — Any person who performs labor or furnishes

[1] Revisal 1873, ch. 99, § 12; Act 1871–2, ch. 138, § 12.

machinery or materials for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure, by virtue of a contract with the owner or his agent, has a lien upon the same and the owner's interest in the land to secure the payment of the claim. To obtain such lien the claimant must, within four months from the time of performing such labor or furnishing such machinery or materials, file an itemized account with the county recorder.[1]

Railroad companies contracting for the construction of a railroad,[2] depot buildings, water tanks, or any part thereof, are liable to each person performing labor or furnishing materials stipulated for in the contract, expressly or impliedly made with the original contractor, or with any sub-contractor, provided the claimant shall serve a notice of his claim upon the company within thirty days after he has ceased to labor or furnish materials for such road; but no lien upon the property is given by this statute for the payment of such claim.

606. Pennsylvania.[3] — The legislature of this state by resolution declared that it shall not be lawful for any company of the state empowered to construct and maintain any railroad, canal, or other public improvement, while any debts and liabilities incurred by the company to contractors, laborers, and workmen employed in the construction or repair of such improvement remain unpaid, to execute any assignment, mortgage, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger, or delay such creditors without their written assent shall first be had; and any such assignment, mortgage, or transfer shall be deemed fraudulent, null, and void, as against any such contractors, laborers, and workmen.

The intention of the legislature by this resolution was to give to an unpaid contractor a priority of claim to the company's property over every right that could be acquired under a mortgage made after the debt to the contractor was incurred; and that the property, into whosesoever hands it might come, should remain

[1] Laws 1877, pp. 168–174.

[2] Laws 1874, p. 51.

[3] January 21, 1843. A further act relating to the enforcement of the lien provided for in this resolution was passed April 4, 1862. The latter act provides for the issuing of a *scire facias* upon a judgment for the services. The plaintiff may proceed in equity notwithstanding this statute. Malone *v.* Shamokin Valley & Pottsville R. R. Co. 34 Leg. Int. 438.

subject to a paramount claim of the contractor so long as the debt due to him remained unpaid. The resolution substantially gave the contractor a lien of indefinite duration. Though it did not give a *jus in re* or a *jus ad rem*, it constituted a charge upon the property, a right to prevent any disposition of it, by which it could be withdrawn from the creditor's reach, and therefore in a legitimate sense an equitable lien. Such lien is not merged in any judgment that may be obtained for the debt. Neither is the lien divested by a foreclosure sale of the property under a mortgage so made, especially if the sale be made subject to any lawful claims which may exist prior to the mortgage. Nor is such lien divested by a statute authorizing the company to borrow money and to pledge its income and property to secure the payment. A repeal of the resolution cannot be inferred from the grant of such a power.[1]

Under these laws a sale under a mortgage executed subsequently to the making of a contract for the building of a railroad is fraudulent and void as against the contractor; and if the property has been conveyed in pursuance of such sale to a new company it is still liable to the claim of the contractor.[2]

This statute[3] is held not to include civil engineers, although the latter were required to render service to the company from the commencement to the completion of the work.[4] Earlier decisions had construed statutes relating to laborers' and servants' wages as intended to secure to manual laborers the fruits of their own work, and not as intended to embrace the earnings of contractors. The intent of all such statutes is to protect a class of persons who are wholly dependent upon the toil of their hands for subsistence, and who cannot protect themselves. In one sense the engineer is a laborer, but so is the lawyer and doctor, the banker, and the corporation officer, yet they cannot properly be included among the laboring classes.

[1] Fox *v.* Seal, 22 Wall. 424; followed by Tyrone & Clearfield R. R. Co. *v.* Jones, 1 Weekly Notes of Cases, 571.

[2] Malone *v.* Shamokin Valley & Pottsville R. R. Co. 34 Leg. Int. 438. In this case the action was brought by the contractor more than six years after the making of the contract.

[3] Laws 1843, p. 367; Laws 1862, p. 235.

[4] Pennsylvania R. R. Co. *v.* Leuffer, 84 Pa. St. 168; *S. C.* 24 Pittsburg L. J. 177; 5 Cent. L. J. 74; 4 Weekly Notes, 77; and see Wentworth's Appeal, 24 Pittsburg L. J. 95.

607. In Rhode Island,[1] any building, canal, turnpike, railroad, or other improvement constructed, erected, or repaired by contract, with or at the request of the owner, is subject to a lien for the work done and the materials used before any other lien which shall originate subsequent to the commencement of such erection, construction, or reparation. If the contract be written, legal process to enforce the lien must be commenced within four months from the time that any payment on such contract shall become due; if not in writing, within six months from the time of commencing the doing such work, or the delivery of such materials. A sub-contractor can have no lien unless within thirty days after commencing the work he gives notice in writing to the person against whose estate he claims a lien that he shall claim the benefit of the lien. Lodging an account or demand in the office of the clerk of the town, or in Providence in the office of the recorder of deeds, is deemed the commencement of legal process.

608. In Vermont[2] it is provided that every railroad shall require sufficient security from the contractors for the payment of all labor performed in constructing its road by persons in their employ; and that such company shall be liable to the day laborers employed by the contractors for labor actually performed on their road, but such liability shall not exist unless the person having such claim shall, in writing, within forty days after performance of such labor, notify the engineer in charge of the section on which the labor was performed that he has not been paid by the contractors.

This provision has been declared constitutional as applied to corporations previously chartered.[3] Under this statute the liability of the corporation is not limited to laborers employed by persons contracting directly with the corporation, but extends to persons employed by sub-contractors.[4] The statute secures to the laborer not only his personal services, but payment for the use of

[1] G. S. 1872, ch. 166, §§ 1–7; Laws 1874, ch. 419.

[2] G. S. 1870, ch. 28, § 72; Act of 1849, No. 41, § 53.

[3] Branin *v.* Conn. & Passumpsic Rivers R. R. Co. 31 Vt. 214; citing and relying upon Kent *v.* N. Y. Central R. R. Co. 2 Kern. (N. Y.) 628; Peters *v.* St. Louis & Iron Mountain R. R. Co. 23 Mo. 107.

[4] Branin *v.* Conn. & Passumpsic Rivers R. R. Co. *supra;* Kent *v.* N. Y. Central R. R. Co. *supra.*

his horse and cart which he has used in the construction of the road.[1]

609. Virginia.[2] — All conductors, brakesmen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, or laborers, and all persons furnishing railroad iron, fuel, and all other supplies necessary for the operation of trains and engines, employed in the service of any railroad, canal, or other transportation company, chartered under or by the laws of this state, or doing business within its limits, have a prior lien on the franchise, the gross earnings, and on all the real and personal property of said company, which is used in operating the same, for and to the extent of the wages or salaries contracted to be paid them by said company; and no mortgage, deed of trust, sale, conveyance, or hypothecation hereafter executed of said property shall defeat or take precedence over said lien.

Any person entitled to the benefit of the lien forfeits the same unless within six months after his wages or salary shall have fallen due he files a memorandum, stating the amount and justice of his claim, under affidavit, according to his best knowledge and belief, with the clerk of the county or corporation court; and the said clerk shall forthwith record the said memorandum in the deed book, and index the same by the name of the person filing the same, and also in the name of the corporation against which the claim is. And it is provided also, that it shall in all cases be sufficient for the claimant to file the memorandum with the clerk of the court wherein deeds may be recorded in the county or corporation wherein the chief office of the company against which the claim may be is located.

610. Wisconsin.[3] — Whenever any railway company in this state is placed by any court of this state in the hands of a receiver, whether upon foreclosure or creditors' bill, it is the duty of such receiver to report immediately to the court so appointing him the amount due by said railroad company, or by the person or persons who were operating said road at the date of such receiver's appointment, to employees and laborers upon said road, and it is made the duty of said court to order the said receiver to

[1] Brauin *v.* Conn. & Passumpsic Rivers R. R. Co. *supra*.

[2] Acts 1877, ch. 200, §§ 1, 2.

[3] Laws 1878, ch. 316, § 1.

pay out of the first receipts and earnings of said railway, after paying current operating expenses under his administration, the wages of all employees and laborers which had accrued within six months prior to the appointment of such receiver.

IV. *Vendor's Lien.*

611. Vendors of land to a railroad company have a lien for the purchase money under the same circumstances they would have such lien against other purchasers ;[1] and as in other cases they may have the lien enforced by a sale of the land.[2] Under some circumstances a vendor may have an injunction restraining the company from continuing in the possession and use of the land, and may have a receiver appointed to enforce the lien.[3] But ordinarily an injunction will not be granted to restrain the company from using the land, or from running trains or engines over it, until a sale, inasmuch as the land would thus be rendered useless to both parties.[4] Even after an unsuccessful attempt by the vendor to enforce his lien by sale, the court will not restrain the company from continuing in possession of the land, but will rather direct another attempt to sell.[5]

A mortgage, so far as it covers after-acquired property, is an equitable lien only, and the record of it prior to the acquisition of the property may not be constructive notice of the existence of the mortgage, or of the purpose for which it was made. But as against an agent of a railroad company, who has been employed in securing the necessary lands for its right of way, such record is presumptive evidence of actual knowledge on his part that *bonâ fide* bondholders had advanced, or would advance, their money upon the faith of the mortgage, and upon the faith of the public records as to the title and incumbrance. Therefore, when such an agent of the Canandaigua and Niagara Falls Railroad Company himself sold and conveyed land to the company, he was deemed

[1] Winchester *v.* Mid-Hants Ry. Co. L. R. 5 Eq. 17 ; Florida *v.* Anderson, 91 U. S. 667 ; Anderson *v.* Jacksonville, Pensacola & Mobile R. R. Co. 2 Woods, 628.

[2] Munns *v.* Isle of Wight Ry. Co. L. R. 5 Ch. 414 ; L. R. 8 Eq. 653 ; St. Germans *v.* Crystal Palace Ry. Co. L. R. 11 Eq. 568 ; 19 W. R. 584 ; Keane *v.* Athenry & Ennis Junction Ry. Co. 19 W. R. 43, 318 ; Walker *v.* Ware, Hadham & Buntingford Ry. Co. 12 Jur. N. S. pt. 1, 18.

[3] Winchester *v.* Mid-Hants Ry. Co. *supra.*

[4] Munns *v.* Isle of Wight Ry. Co. *supra ;* Lycett *v.* Stafford & Uttoxeter Ry. Co. L. R. 13 Eq. 261 ; 41 L. J. 474.

[5] Williams *v.* Aylesbury & Buckingham Ry. Co. 21 W. R. 819.

to have waived any claim to a vendor's lien for the price, as against bondholders secured by a mortgage of the road and the real estate then owned by the company, or which might afterwards be acquired.[1] It was regarded as inconsistent with good faith on his part that he should retain a secret lien.

Moreover, the legal title of the land in question, which was conveyed to the railroad company, vested immediately in the latter. At the same instant the lien of the mortgage, which had before that been given by the railroad company, and which, before that time, remained but an equitable claim upon rights to be acquired, became a vested legal right upon the premises in question. "Assuming now," said Potter, J., delivering the judgment of the Court of Appeals of New York,[2] "for the purpose of the argument, the position urged by the plaintiff that he did not intend to waive his equitable lien for the purchase money, all that he can then claim is, that his equitable lien attached at the same instant of time with the mortgage lien. Here, then, are two liens accruing at the same instant, the one a secret equitable one, the other a legal, written, recorded, public one. The question would then seem to be, which of these liens has the priority?" This question is answered by the decision, that the lien of the recorded mortgage became a legal mortgage as soon as the land was acquired, and that this lien was superior to the equity of the vendor.

As against a mortgage which in terms covers all the property a railway company may afterwards acquire for the use of its road, a person who afterwards sells to it land for its road-bed cannot set up a vendor's lien for purchase money. The mortgage becomes a lien upon such land from the moment the company acquires the title.[3] After such a mortgage has been foreclosed, and the road has passed into the hands of innocent purchasers, there is an additional reason why such a lien cannot be enforced.[4]

A sale under a vendor's lien necessarily cuts off all incumbrances made by the company, and gives the purchaser a title freed from all claims on the part of the company itself, and from all claims on the part of the public.[5]

[1] Fisk *v.* Potter, 2 Abb. (N. Y.) App. Dec. 138; and see Carpenter *v.* Black Hawk Gold Mining Co. 65 N. Y. 43.

[2] Fisk *v.* Potter, *supra*.

[3] Pierce *v.* Milwaukee & St. Paul R. R. Co. 24 Wis. 551.

[4] Pierce *v.* Milwaukee & St. Paul R. R. Co. *supra*.

[5] Munns *v.* Isle of Wight Ry. Co. *supra*; Walker *v.* Ware, Hadham & Buntingford Ry. Co. 35 Beav. 52; 14 W. R. 158.

V. *Transportation Subscriptions.*

612. In Missouri[1] provision is made that a railroad company may receive subscriptions to the capital stock of the company to aid in the construction and equipment of its road, to be known as "transportation subscriptions," which are payable in services to be rendered by the company in the transportation of passengers and freight. These subscriptions are made an irrevocable and indefeasible first lien and charge against such railroad, and the road-bed, rolling stock, and depots, engine-houses, and machine shops of such company, then in possession of or thereafter acquired by such company, or its successors or assigns, until discharged, except as to mortgages recorded in the county or counties through which the line of such road runs, or is proposed to be run, before the date of the making of such subscription; which mortgages have preference only as to so much of such road and the property of such company as is situated in counties in which the same are at that time recorded, and such mortgages have no preference upon any property acquired after the time of making such subscription.

VI. *Judgment Lien.*

613. A mortgage of corporate property or of the corporate undertaking has priority over a subsequent judgment creditor of the company, and it does not vary the rule that the judgment is obtained before the mortgagee has entered into possession himself, or through a receiver.[2] If such judgment creditor has obtained the appointment of a receiver, the mortgagee may have a receiver appointed who will supersede the receiver already in possession.[3] The judgment creditor may also be restrained at the suit of a prior mortgagee from levying upon any of the property included in terms, or by inference in the mortgage.[4]

A mortgage, of which a judgment creditor has actual notice at the time of his recovery of judgment, though not recorded till afterwards, has priority of the judgment lien. If such judgment

[1] Laws 1877, March 29; Myer's Supplement to Stats. p. 81.

[2] Legg *v.* Mathieson, 2 Giff. 71.

[3] Ames *v.* Birkenhead Docks, 20 Beav. 332, 352.

[4] Legg *v.* Mathieson, *supra;* Gardner *v.* London, Chatham & Dover Ry. Co. L. R. 2 Ch. App. 201.

be afterwards assigned, the assignee takes it subject to all the equities affecting the original plaintiff in the judgment.[1]

Under a mortgage comprising the real and personal property of a railway company, a subsequent judgment creditor of the company may be enjoined from levying his execution upon any part of the property, although the mortgage be not due. Whenever the mortgagee's security is in danger of being impaired by the acts of a junior creditor, he may file his bill in chancery to protect his security, and restrain the threatened injury.[2]

[1] Butler *v.* Rahm, 46 Md. 541.

[2] Wildy *v.* Mid-Hants Ry. Co. 16 W. R. 409; 18 L. T. (N. S.) 73; Legg *v.* Mathieson, 2 Giff. 71; 29 L. J. Ch. 385.

CHAPTER XXI.

SCHEMES FOR REORGANIZATION AFFECTING THE PRIORITY OF MORTGAGES.

I. Rights under agreements for reorganization, 614–618.

II. Rights of preferred stockholders as against mortgagees, 619–624.

I. *Rights under Agreements for Reorganization.*

614. Schemes for reorganizing corporations. — In general the rights of secured creditors cannot be varied without their consent. It often happens, however, that such creditors are in effect compelled to admit unsecured creditors and the stockholders of an insolvent company to come into a scheme for its reorganization and share in its benefits in some degree. It is sometimes so far within the power of the stockholders and unsecured creditors to embarrass and delay proceedings for the foreclosure of the mortgage and sale of the property, that it is expedient for the mortgage creditors to arrange for a reorganization, and give up something of their own security, for the sake of avoiding litigation and delay.

The entering into a scheme of reorganization is a voluntary matter with creditors or stockholders of a corporation. It cannot be forced upon any one except by virtue of a statute existing prior to the charter of the corporation, so that such statute becomes a part of the contract under which its securities and stock were issued.

By force of statutory provisions for reorganization the rights of secured creditors may be varied without their consent. Thus the Railway Companies Act of England[1] provides, "where a company are unable to meet their engagements with their creditors,

[1] 30 & 31 Vict. 127, §§ 6–16, Act of 1867. Instances of such schemes may be found in London Financial Asso. *v.* Wrexham, &c. Ry. Co. L. R. 18 Eq. 566; Bristol & North Somerset Ry. Co. *in re*, L. R. 6 Eq. 448; Devon & Somerset Ry. Co. *in re*, L. R. 6 Eq. 610; Ib. 615; Cambrian Ry. Co's. Scheme *in re*, L. R. 3 Ch. 278; Munns *v.* Isle of Wight Ry. Co. L. R. 8 Eq. 653; Stevens *v.* Mid-Hants Ry. Co. L. R. 8 Ch. 1064.

the directors may prepare a scheme of arrangement between the company and their creditors, with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share and loan capital, or either of them, and may file the same in the Court of Chancery for England or in Ireland, according to the situation of the principal office of the company, with a declaration in writing under the common seal of the company, to the effect that the company are unable to meet their engagements with their creditors." The scheme must be assented to by three fourths of the mortgagees and holders of bonds, debenture stock, and preference stock respectively affected by it, and when so assented to may be confirmed by the Court of Chancery. But in such case it is to be observed that the statute becomes a part of the contract under which subsequent securities are taken. The authority of parliament in respect to existing corporations is however different from that possessed by legislatures in this country.

615. **A substantial departure from the terms of a compromise agreement**, the object of which was to substitute third mortgage bonds for prior liens and debts existing against a corporation, will absolve the parties to an executory agreement from its obligations, and leave them to stand on their original rights under the prior mortgage. Thus where the agreement signed by a bondholder recited that the amount of debts for which a third mortgage was to be substituted was $955,000, and a mortgage authorized and executed to carry out the agreement recited that the debt secured by it was $1,200,000, the departure from the agreement was considered sufficient to justify a party to it in refusing to comply with it.[1] The excess is so great as to require explanation. A small increase of the amount arising from an accidental omission of a debt which the agreement was intended to provide for might not invalidate the agreement. But when the excess is so material, and the only explanation of it is that the mortgage was increased in order to raise funds to enable the company to so construct its road as to form a new connection with another railroad, — an object foreign to the purpose of the compromise agreement, — the change cannot be justified. The fact that the whole amount of $1,200,000 had not been issued under

[1] Miller *v.* Rutland & Washington R. R. Co. 40 Vt. 399.

the mortgage is immaterial so long as the corporation had the right to issue bonds to that amount.

616. **Failure of bondholder to surrender bonds in accordance with agreement.** — A bondholder who has entered into an agreement for the reorganization of a railroad company and the purchase of the property at a foreclosure sale is not entitled to the benefits of his agreement, if he fails to perform a stipulation on his part to surrender his bonds when requested prior to the sale to trustees appointed to act for the parties to the agreement; especially when the only means provided for the purchase of the road was the bonds held by the signers of the contract. Such bondholder cannot after the sale come in and participate in the benefits of a reorganization, but can claim only the amount of purchase money yielded by the sale.[1]

617. **A party to an agreement for the reorganization of a company cannot set up a secret agreement with himself,** to the disadvantage of the other parties to it. The Wilmington and Manchester Railroad Company having issued bonds secured by first, second, and third mortgages, desiring to provide additional means for rebuilding and equipping its road, issued a new mortgage for a sum sufficient to retire the three existing mortgages, and provide for the sum desired; and most of the bondholders under the old mortgages came into the arrangement, and exchanged their old bonds for the new. The new mortgage secured bonds of three classes: first, preference bonds for which the first mortgage bonds were to be exchanged; second, preference bonds to be used in rebuilding and equipping the road; and third, preference bonds to be used in retiring the second and third mortgage bonds. Default having been made under the new mortgage, the property was sold under a decree of foreclosure, and the proceeds were directed to be applied, first, to the payment of several creditors under the old mortgages, who had not exchanged their bonds; and the balance to the payment of the first preference bonds *pro rata*, the proceeds being insufficient to satisfy this class in full. A holder of third preference bonds then intervened by petition, alleging that he had exchanged bonds secured by the second and third mortgages for the new bonds,

[1] Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75.

under a separate agreement, that if all the old bondholders did not come into the arrangement his old bonds should be returned to him, and he should be restored to all his rights under them; and he, therefore, prayed that his old bonds be returned, and that he be paid the amount out of the proceeds of sale as a creditor who had not parted with his prior lien under the old mortgages. But it appearing that the other purchasers of the new bonds had no notice of this private agreement, he had no equity as against them to the relief asked for. Seeking relief in equity, he can obtain it only on equitable principles. The arrangement between the company and the several creditors, for the exchange of their securities, is regarded in equity as a single contract, for the reason that both the relations of all these creditors with the company, and their relations with each other, entered into its consideration. The equities among the creditors must be satisfied; and against these he cannot set up a secret agreement with the company, giving him an advantage over the other bondholders.[1]

618. Under a scheme to relieve an insolvent railroad company by allowing all its creditors to share on equal terms in a mortgage of all its property, a creditor who held its promissory note, with other notes of the corporation, as collateral security for this note, was allowed to prove only the amount of the original note against the corporation, because the purpose of the arrangement was to give all the actual creditors, without regard to the nature of their claims or the form of the contract under which they arose, an equal participation in the security afforded by the mortgage.[2] This is very different from the case where the collateral security was a part of a limited amount secured by mortgage, and the company being in liquidation, the creditor had a legal right to avail himself of the benefit of his collateral security by proving the whole of it against the property.

II. *Rights of Preferred Stockholders as against Mortgagees.*

619. Questions of priority have sometimes arisen between preferred stockholders and subsequent mortgagees. — What

[1] Jesup *v.* Wilmington & Manchester R. R. Co. 2 S. C. 469.

[2] Third Nat. Bank *v.* Eastern R. R. Co. 122 Mass. 240. In Morris Canal & Banking Co. *v.* Fisher, 9 N. J. Eq. 667, it was doubted whether a debtor's own bond or mortgage, deposited by way of a collateral, could be held to be a pledge which could be sold in the market and applied as such.

mortgage interest may be paid by a railroad company, before the payment of interest on its preferred stock must depend on the construction to be given the conditions attached to such stock. Whatever rights attached to it when it was issued continue to adhere to it. If, at the time of its issue, only interest on mortgages then existing was to be paid before interest on preferred stock, subsequent mortgage indebtedness will not affect that stock, nor the legal right of its holders, to payment of interest before payment of interest on mortgages given for such subsequent indebtedness. But preferred stockholders would have no preference over subsequent mortgagees in case the stock was issued on such terms that it should be held that interest on all mortgages of the corporation, whether for indebtedness prior or subsequent to the issue of the preferred stock, was first to be paid from the earnings.[1]

620. **Ordinarily preferred shareholders are entitled to have deficiencies of their dividends made up** out of the earnings legally applicable to the payment of dividends, whenever such earnings are received, in preference to any payment to the holders of the common stock. This right is inferred from the contract, and need not be provided for in express terms.[2] The preferred shareholders are entitled to have the full amount of their dividends paid before any payment is made in respect of dividends upon the ordinary stock. Such dividends, in relation to the common stock, are substantially interest chargeable exclusively on profits; yet there is nothing in such a use of the word *dividend* which is at all at variance with the ordinary usage.[3] Such dividends are not payable absolutely or unconditionally, as interest is, but only out of profits made by the company. If there are no dividends there are no profits. If there were no profits last year, but there are profits this year, the arrears of dividends at the stipulated rate, payable for last year, together with the dividends for this year, are both to be paid if the profits are sufficient for this purpose. The preference is limited to the profits of the company whenever earned.[4] Preferred stockholders do not lose their rights

[1] Thompson *v.* Erie R. Co. 42 How. (N. Y.) Pr. 68, per James, J.

[2] Corry *v.* Londonderry & Enniskillen Ry. Co. 29 Beav. 263; *S. C.* 7 Jur. N. S. 508; 30 L. J. Ch. 290.

[3] Henry *v.* Great Northern Ry. Co. 1 De G. & J. 606, per Lord Cranworth, Lord Chancellor; *S. C.* 4 Kay & J. 1.

[4] Taft *v.* Hartford, Providence & Fishkill R. R. Co. 8 R. I. 310; Crawford *v.* North Eastern Ry. Co. 3 Jurist N. S. 1093; *S. C.* 3 Kay & J. 723; London India Rubber Co.

to have arrears of dividends made up to them through laches in asserting their rights.[1]

The use of the word "guaranteed," in connection with preferred stock, does not change the legal effect of the rights of the holder of such stock.[2]

621. In ascertaining the profits of a railroad company for the purpose of making dividends on preferred shares, the Master of the Rolls, Romilly, laid down the following rules:[3] "I am of opinion that all the debts of the company are first payable, other than those which, for want of a better expression, may be called funded debts; for instance, if the defendants have raised money by mortgage, under the powers contained in their act, for the purpose of completing their line, this does not constitute such a debt as can be paid off out of the profits before the profits are divided. But, on the other hand, any debts which have been incurred, and which are due from the directors of the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been, and would have been paid at the time, had the defendants possessed the necessary funds for that purpose, those are so many deductions from the profits, which, in my opinion, are not ascertained till the whole of them are paid."

622. St. John *v.* Erie Railway Company.[4] — Such a question arose in relation to the preferred stock issued by the Erie Railway Company between the years 1861 and 1869, in pursuance of a contract of reorganization entered into in 1859 between the shareholders and creditors of a prior corporation, known as the New York and Erie Railroad Company. That company had failed to pay some of the interest due upon bonds issued by it and secured by mortgages, and certain of its unsecured debts. Foreclosure proceedings had been commenced, and a receiver of the property,

in re, 37 L. J. Ch. 235; Matthews *v.* Great Northern Ry. Co. 5 Jur. N. S. 284; Stevens *v.* South Devon Ry. Co. 13 Beav. 48; *S. C.* 9 Hare, 313; Smith *v.* Cork & Bandon Ry. Co. Ir. R. 3 Eq. 356; affirmed Ir. R. 5 Eq. 65. In this case the prior cases are reviewed at length.

[1] Matthews *v.* Great Northern Ry. Co. *supra*; Smith *v.* Cork & Bandon Ry. Co. *supra*.

[2] Taft *v.* Hartford, Providence & Fishkill R. R. Co. *supra*.

[3] Corry *v.* Londonderry & Enniskillen Ry. Co. 29 Beav. 263, 272.

[4] 10 Blatchf. 271; on appeal, 22 Wall. 136.

covered by at least two of the five mortgages of the road, had been appointed. The shareholders, and bondholders under all of the mortgages, and the unsecured creditors, then entered into a contract whereby the mortgaged property was to be purchased for the account of the parties to the contract at the foreclosure sale. The holders of the mortgages were to be mortgagees under the new company, and the holders of unsecured bonds of the old company were to exchange their bonds for preferred stock equal in amount. The contract provided that the "preferred stock should be entitled to preferred dividends out of the net earnings, if earned in the current year, but not otherwise, not to exceed seven per cent. in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full." The new corporation was formed under legislative authority, and preferred stock to the amount of $8,500,000 and upwards was issued. Dividends were regularly paid on this stock until the year 1868. In 1865, after the preferred stock was created, the company issued one million pounds of sterling bonds, unsecured by mortgage, bearing interest at six per cent. per annum in gold coin. They were issued for money borrowed to equip and repair the road, and the money was expended for these purposes. During the year 1868 the company paid the interest in full on these bonds; but on the 31st of December, 1868, after deducting the operating expenses, the interest paid on the mortgages existing January 1, 1862, and the rent of roads leased prior to that date, the net earnings were sufficient to pay only a partial dividend on the preferred stock; and of course if no interest had been paid by the company on the sterling bonds, and no rent for roads leased after January 1, 1862, such dividend on the preferred stock would have been increased. A holder of preferred stock brought a bill in the Circuit Court of the United States praying that the court would ascertain and adjudge the meaning of the words "net earnings," and would enjoin the company from applying any portion of the net earnings, after payment of the interest on the mortgage bonds, to any other purpose than the payment of a dividend on the preferred stock. It was claimed in his behalf, that as the unsecured bondholders stood, when the contract was made, next in order as creditors to the holders of the mortgage bonds, they became entitled to occupy the same relative position as holders of preferred stock, and to receive their dividends on such stock out of the earn-

ings, before the payment of interest on obligations incurred after the issuing of such stock; that the words, "after payment of mortgage interest and delayed coupons in full," did not mean merely "before any dividend is paid on the common capital stock," but meant "next after payment of mortgage interest and delayed coupons in full;" that this construction is sensible, because of the prior position of the preferred stockholders, as holders of unsecured bonds entitled to be paid interest next after the payment of mortgage interest; that they did not waive, but preserved, their position as entitled to such interest, and only modified their right in regard to the repayment of the principal of their debts; that the preferred stock is only a new form of security for the debts in exchange for which it was issued, holding the same place, and entitled to be paid the same interest, as such debts were entitled to when the exchange was made subject to the proviso as to the earning of the interest in the current year; that the holders of the preferred stock are not subject to the contingencies of new loans and new leases, and extended enterprises; that while the contract contains no limitation on the power of the company to issue interest-bearing securities, it contains a limitation on their power of disposing of their net earnings; that the shares of preferred stock are, in fact, perpetual bonds, with no right to the repayment of the principal, but with a specified preferential right in regard to interest; that the fact that it is called "stock," and that it is declared to be entitled to "dividends," and that its holders have an equal right to vote with the holders of common stock, cannot destroy the rights which appertain to it by the terms of the contract. But it was held that the preferred stockholders were not entitled to a dividend before the payment of interest on such bonds.[1]

623. The terms preferred stock and preferred dividends, taken by themselves and in connection with other words, are commented upon at length by Judge Blatchford in giving the opinion of the Circuit Court in the foregoing case: "I do not think that a fair and reasonable construction of the contract, with which the language of the statutes and of the certificates of stock is in harmony, sustains the views urged on the part of the plaintiff. The words are not, 'next after payment of mortgage interest.'

[1] St. John *v.* Erie Ry. Co. 10 Blatchf. 271.

They are, 'after payment of mortgage interest.' The contract, in its fifth article, provides that the holders of the unsecured bonds agree to exchange them for preferred stock,' 'to be entitled to preferred dividends, out of the net earnings.' The only way mentioned in the contract, in which the stock was to be 'preferred stock,' was, that it was to be entitled to 'preferred dividends.' What was that word 'preferred' to mean? 'Preferred' over what? Were the dividends to be 'preferred' over and to be paid before the mortgage interest on the five mortgages, so as to become, in fact, by the agreement of the holders of the mortgage bonds, who were parties to the contract, a virtual mortgage on the net earnings to the extent of such dividends, prior to the lien of the five mortgages? But for some expression of intention in the contract, on that subject, the mere word 'preferred' might be construed so to mean. It otherwise might mean, not merely 'preferred,' as respected the holders of common stock, but 'preferred,' as respected the securities held by all other parties to the contract. Therefore something must be inserted to exclude such an inference, and to secure to the holders of mortgage bonds a priority as to the payment of their delayed coupons, and of their future interest. Such priority was accordingly secured by adding the words, 'after payment of mortgage interest and delayed coupons in full.' There is nothing to show that the words have any other effect, or were intended to have any other effect. An intention that they should have such an effect, which is a reasonable effect, is inferable from the fact that they clearly have such an effect, and it is unreasonable to infer any other intention, when that intention is a sufficient reason for inserting them. Without them there is nothing to give the mortgage interest a priority over the 'preferred dividends.' In this view it is impossible to see in them anything except the expression of a priority in favor of the mortgage interest over the 'preferred dividends,' and impossible to see in them any expression of a priority in favor of the 'preferred dividends' over anything. . . . . The former holders of the unsecured bonds of the old company, by taking the preferred stock in exchange for their bonds, abandoned their position as creditors, and became merely stockholders in the new company, as against their existing and all future creditors of the new company. They acquired the same right to vote as the holders of common stock. In the absence of any expressed intention to the

contrary, it would be very unreasonable to suppose that the general power of the defendants to take leases of roads and to pay the rents of them, and to borrow money and issue bonds therefor and pay the interest on such bonds, would have been subordinated by the legislature or by themselves to the rights of any class of their stockholders, and equally unreasonable to suppose that the claims of creditors would have been postponed to those of stockholders. . . . . Moreover, the views urged on the part of the plaintiff, if sound, must be carried to their legitimate conclusions. The money has been borrowed on the sterling bonds. Their holders are creditors. If the company should become bankrupt, are the claims of those creditors to be repaid their principal to be postponed to the claims of the preferred stockholders, in respect to the capital of their shares? The stock is, in the contract, declared to be 'preferred stock,' as well as to be entitled to 'preferred dividends.' The statute and the certificates call it 'preferred capital stock.' If 'preferred stock,' why should it not have preference over the principal of subsequently created debts, if dividends on it are to precede the payment of interest on such debts? Yet, such a claim would probably never be advanced, and certainly would not be admitted. The statement in the contract, the statute, and the certificates, that the 'preferred dividends' are to be paid out of the 'net earnings' sheds no light, one way or the other, for a solution of the question. The mortgage interest and the delayed coupons are also to be paid out of the net earnings. Net earnings are properly the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts, or out of the net earnings, the remainder is the profit of the shareholders, to go towards dividends, which in that way are paid out of the net earnings."

624. **Preferred dividends payable out of net earnings are not in the nature of interest** constituting a debt, but are payable only out of profits in the manner specified by the contract. The decree of the Circuit Court, in the case last under consideration, was upon appeal affirmed by the Supreme Court of the

United States.[1] Mr. Justice Swayne, delivering the opinion of the court, considered the effect of the agreement for reorganization as regards the preferred stockholders. "The original takers of the preferred stock were creditors. They abandoned that position and became stockholders. They thereupon ceased to be the former, and can only be regarded as the latter. They surrendered their debts and received in return stock of the same amount, which gave them a chance for annual dividends of seven per cent., and a voice by voting in the choice of those by whom the affairs of the company were to be administered. What they were to receive was not interest, but dividends; and they were to receive them in priority to the holders of the common stock. The latter could receive nothing until the former were satisfied. The maximum payment on the preferred stock was specified. It might be less, or nothing. It could not be more. The amount subject to the limit prescribed depended wholly upon the residue of the net earnings applicable in that way. The language employed is apt to express the relation of stockholders. None to express the relation of creditors is found in the instrument; and there is nothing from which the intent to continue that relation any longer can be inferred. If the mortgages were foreclosed and there were a surplus left insufficient to satisfy the general creditors, it is quite clear that the holders of the preferred stock could have no right to share in the fund." The claim made in behalf of the preferred stockholders, that the *net earnings* are predicated of things as they were when the preferred stock was issued, the learned judge declared to be without support, express or implied. The company had a right to take new leases, and make new mortgages. It had the right so to conduct its operations, in good faith, as it might see fit; and it was from them and all of them that the materials for the computations of earnings were to be derived. In conclusion, it was the judgment of the court that the rents for the year, accruing under leases taken by the company after the issuing of the preferred stock, and the interest upon the sterling bonds for that year, were properly paid; and that there were no net earnings earned in that year which could be properly applied in payment of preferred dividends.

[1] St. John *v.* Erie Ry. Co. 22 Wall. 136. See, on point that such dividends are not a debt due absolutely, Taft *v.* Hartford, Providence & Fishkill R. R. Co. 8 R. I. 310, 335.

CHAPTER XXII.

FORECLOSURE SALES UNDER CORPORATE MORTGAGES.

I. Sale of entire property, 625–628.
II. Conduct of sale, 629–631.
III. What franchises pass by the sale, 632–635.
IV. Distribution of proceeds of sale, 636–641.
V. Setting aside of sale, 642–652.

I. *Sale of entire Property.*

625. Under a deed of trust which contemplates but one sale, the entire property may be sold upon a default in the payment of interest. It is moreover a well settled rule that the whole property may be sold upon a default in the payment of interest before the principal is due, when the property cannot be sold in parts without injury to the whole.[1] As a general rule it is evident that a continuous line of railroad cannot be cut up and sold piecemeal without destroying its value. The unity and continuity of a line of railroad are among the important elements of its value. Therefore, although a mortgage contains no provision making the whole debt due upon a default in the payment of interest, and no provision authorizing a sale of the whole property covered by the mortgage, a court of equity will upon such default order a foreclosure and sale of so much of the property as will satisfy the instalments then due;[2] and generally if the property cannot be divided without injury, a sale of the whole would be decreed.

When under a deed of trust of a railroad and all its property the trustees without the aid of a court, by following the terms of the deed, might sell the entire line of road upon a default in the payment of interest before the maturity of the principal, the power of the trustees is not any the less when the court has been

[1] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 447. See 2 Jones on Mortgages, §§ 1616–1619.

[2] Goodman *v.* Cincinnati & Chicago R. R. Co. 2 Dis. (Ohio) 176; West Branch Bank *v.* Chester, 11 Pa. St. 282.

asked by the bondholders to construe the deed of trust and to order the trustees to execute it. If the trustees in such case sell the whole road as an entire and indivisible property, under the direction of the court, they do so by virtue of the power vested in them by the deed. The court does not foreclose the mortgage as in an equitable foreclosure. It does not confer upon the trustees any power which they did not already possess, by virtue of the deed of trust, or impose upon them any new duties, but simply tells them what their powers are under the deed, and requires them to exercise these powers for the benefit of the *cestuis que trust*.[1]

626. In a few states special provision has been made by statute in regard to the sale of the entire property. Thus, in Indiana[2] it is provided that in case of the sale of any railroad and its property, under or by the authority of any competent court, part of which railroad may be situate within the state and part in an adjoining state, and embraced in the mortgage or deed of trust, the whole may be sold at one time and place, as an entirety, at such point on the line of said railroad, either within or without the state, and upon such notice as the court or courts ordering such sale may direct.

In Kansas[3] it is provided that in actions to enforce a mortgage or deed of trust, executed by any railroad company upon its railroad or other property, or any portion thereof, if the property mortgaged shall be situated in more than one county in this state, the District Court of any one of such counties shall have jurisdiction to render judgment against such company for the amount found due in the same manner as is provided by law, concerning other debts secured by mortgage on real property, and to decree and enter an order for the sale of said mortgaged property, and to provide for the terms and method of payment of the purchase price of the property ordered to be sold; which order shall be directed to the sheriff of any or either of the counties in which said mortgaged property is situated. And the sheriff to whom such order may be directed shall have power to sell the whole of said

[1] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 447, 456.

[2] 1 R. S. 1876, p. 728, ch. 218, § 1, Act March 3, 1865. See statute in New Jersey, R. S. 1877, p. 922, § 77.

[3] Laws 1876, ch. 108, § 1; Dassler's Stats. 1876, § 4625.

property pursuant to the order of the court, and make return of his proceedings in the same manner as may be provided by law in ordinary cases of foreclosure of mortgages upon real estate; and upon the coming into court of the return of the sale by the sheriff, if the same shall be found to have been made in compliance with the order of the court, the court shall thereupon confirm the sale, vesting in the purchasers title to the property sold, and order the execution of a deed by the sheriff, as in the case of the sale of real estate upon execution or other final process.

In Kentucky[1] it is provided that sales of the property and franchises of railroad and turnpike corporations, when adjudged by a court, shall be after such notice and advertisement, and at such place as, in the discretion of the court, shall seem proper; and if such sales are made on the foreclosure of one or more mortgages or deeds of trust, the court may order such sale to be made for the whole amount of the outstanding bonds and interest secured by such deed or deeds of trust or mortgage; or if said property and franchises will produce so much, then for the amount of interest due under said deed or deeds of trust or mortgage, or either of them, subject to the payment by the purchaser of the outstanding bonds, and interest secured thereby, as they become due; and in the latter event may, by proper orders, secure the assumption thereof by the purchaser. But where a sale shall be ordered to be made subject as aforesaid, the court shall direct the officer making such sale, in the event that such property and franchises so offered do not sell for enough to pay the amount aforesaid, then to sell such property and franchises free from incumbrances. Sales made under these provisions shall be on such credits as the court may deem proper. But if the sale be made subject to the payment of the principal as aforesaid, the average credit shall not be less than two years, nor more than four years; and where the sale is not made subject as aforesaid, the average credit shall not be less than three years, nor more than six years.

In New York the Supreme Court may direct a sale of the whole of the property, rights, and franchises covered by a mortgage or deed of trust, at any one time and place to be named in the judgment or order, either in the case of the non-payment of interest only, or of both the principal and interest due and unpaid and secured by such mortgage or deed of trust.[2]

[1] Laws 1876, ch. 447, § 1.

[2] Laws 1876, ch. 446, p. 482.

627. **When specific property subject to a separate incumbrance can be sold separately** without injury to other property, as for instance when a section of a railroad subject to a separate mortgage can be sold by itself, without sacrificing the whole line of road, it should be thus sold in order that the incumbrancer may have a chance of protecting his securities without involving himself in onerous engagements. Cases sometimes occur where a sale of the entire property covered by different mortgages must be made absolutely, and the different claims adjusted upon the fund subsequently; thus, when a sale of a portion of a railroad, which is subject to a separate mortgage, would be injurious to the entire property, which is subject to other mortgages under which a sale of the entire road is asked for, it may be that the only just course that can be pursued is to sell the whole and adjust the rights of the mortgagees afterwards.[1]

628. **Upon the foreclosure of a mortgage of a railroad and its franchises for a failure to pay an instalment of interest,** when the mortgage contains no provision that the principal shall become due upon such a default, if the property can be divided without injury, only so much of it should be sold as will satisfy the amount due; but if it is not susceptible of division, as would usually be the case, it must be sold as an entirety. When, however, it seems probable that the property is worth much more than the amount of the debt and interest, the court may very properly, upon the request of the company, order the property to be leased for the shortest term that will produce the amount due, and the accruing interest. The court should, in such case, require the lessee to give a covenant with approved security, to keep the property in good repair, and to return it at the end of the term in as good condition as it may be when received.[2]

After a sale of an entire road has been made upon a default in the payment of interest due upon a mortgage of it before the principal debt is due, the proceeds are applied in the first place to the payment of the interest for the satisfaction of which the sale was made, and the remainder is brought into court, to be disposed of under its direction.[3]

[1] Campbell *v.* Texas & New Orleans R. R. Co. 2 Woods, 263.

[2] Bardstown & Louisville R. R. Co. *v.* Metcalfe, 4 Mete. (Ky.) 199.

[3] Wilmer *v.* Atlanta & Richmond Air Line Ry. Co. 2 Woods, 447.

II. *Conduct of Sale.*

629. The marshal or other officer, who makes a sale under a decree of foreclosure, is not only invested with a reasonable discretion as to the manner of conducting the sale, but is not at liberty to overlook or disregard such discretion. Acting under the decree, he has duties to perform to the complainant, to the vendor and purchaser, and to the court, and is bound to exercise his best judgment in the performance of all these duties. The usual practice is for the officer in selling the property to act under the advice of the solicitor of the complainant. "Granting that solicitors may properly advise the officer, still it must be borne in mind that the authority and discretion in making the sale are to a certain extent primarily vested in the officer designated in the decree. Unreasonable directions of the solicitor are not obligatory and should not be followed; as if the solicitor should direct the property to be struck off at a great sacrifice when but a single bidder attended the sale. Under such circumstances the officer might well refuse to do as he was directed, and he might be justified in postponing the sale to a future day to prevent the sacrifice of the property. Every such officer has a right to exercise a reasonable discretion to adjourn such a sale, and all that can be required of him is, that he should have proper qualifications, use due diligence in ascertaining the circumstances, and act in good faith, and with an honest intention to perform his duty."[1] In a case of a sale of a railroad under a decree of foreclosure which directed the marshal to sell at public auction, unless the mortgagors, previously to such sale, should pay to the complainants the sum of $254,175, being the amount of the decree, four different adjournments, extending over a term of seven months, were made for the purpose of enabling the mortgagors to make an arrangement to pay the debt; and although a bid of nearly the whole amount of the debt was made on the second day fixed for the sale, and the whole amount of the debt was bid on the third day fixed for the sale, and the adjournments were made by direction of the complainant's solicitor, the company having redeemed before the fourth day to which the sale was adjourned, it was held that the adjournments were made for sufficient cause, and the sale was properly discon-

[1] Blossom *v.* Railroad Co. 3 Wall. 196, 208, per Clifford, J. See 2 Jones on Mortgages, §§ 1633–1635.

tinued. The highest bidder has in such case no right to insist upon being allowed to pay the amount of his bid, and have a confirmation of the sale to himself.[1]

630. A mortgage trustee will be left to exercise his discretion as to the time of making sale under a decree of foreclosure, and as to making a sale at all pending an appeal from the decree, which the appeal does not supersede. The trustee is the representative of all the bondholders, and it is for him to determine whether the best interests of all concerned would be promoted by a sale, and individual bondholders have no right to insist upon an execution of the decree.

The Central Railroad Company of Iowa having made default in payment of interest, some of the bondholders requested the trustee to foreclose the mortgage. He did not, however, institute proceedings to foreclose, and thereupon these bondholders brought suit for this purpose in the Circuit Court of the United States for the District of Iowa, and made the trustee a party to it. A demurrer, on the ground that the trustee only could bring such suit, was overruled. The trustee then asked and obtained permission to file a bill to foreclose, and upon filing such bill the action was consolidated with that commenced by the bondholders. A decree of sale was entered at the October Term, 1875, upon the assumption that the parties to be affected assented to the decree. This assumption was not, however, well founded, for certain other bondholders, having been allowed to intervene, took an appeal to the Supreme Court of the United States. They perfected the appeal; but failing to give bond as required, the *supersedeas* was discharged. A committee of bondholders asked the trustee to order the special master to proceed with a sale of the road, and the trustee failing to do this, the committee directed the master to sell. This he refused to do. The trustee thereupon petitioned the court for advice in respect to the sale, and the committee of bondholders moved for an order directing the trustee and master to execute the decree. Dillon and Love, JJ., upon a hearing in March, 1877, declined to order a sale, the latter saying:[2] "The appellants are seeking to get the decree reversed. It must be borne in mind that they have never yet had the judgment of any

[1] Blossom *v.* R. R. Co. *supra.*

[2] Farmers' Loan & Trust Co. *v.* Central R. R. Co. of Iowa, 11 West. Jurist, 428; 5 Cent. L. J. 56; 4 Dill. 533.

court upon their rights and equities under the mortgage. If the court had passed its independent judgment upon their rights and equities, and had made a decree disposing of them accordingly, and if they had failed to supersede the decree, I do not see that they would have any reason to complain, even though they could not, in the event of a reversal, be placed as to their rights under the mortgage in *statu quo*. But in the absence of any real adjudication by the court, and by virtue of a consent decree, to which they were not parties, to have the property in which they are interested disposed of, so that in the event of a reversal they cannot be awarded the very relief to which they would be entitled by the terms of the mortgage, would seem to me not at all in accordance with the principles of equity. Again, it is impossible for us to know what the decision of the Supreme Court will be, and what complications may consequently arise from the execution of the decree in the mean time. Will the Supreme Court dispose of the case with reference to the fact that the decree below has been executed, and the trust property placed beyond judicial control, or will it determine the controversy with reference to the state of the case and property at the time when the decree was entered below? I confess I do not see the way clear in the future, if the *status quo* of the trust property be changed, as required by the terms of the decree. On the contrary, it appears to me that no complications can possibly arise if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest by reason of the delay. If the majority feel aggrieved by the refusal of the court to grant their present motion, I suppose they have their remedy: they can apply for a mandamus, and thus submit their case to the judgment of the Supreme Court, and if it be a matter of right in them, and not of discretion in the Circuit Court, they can thus obtain redress."

In accordance with this suggestion, the parties went before the Supreme Court on an application for a mandamus to compel the Circuit Court to execute the decree by a sale of the road, but the application was refused, on the ground that the trustee is the representative of all the bondholders, and that they have no legal right to insist upon an execution of the decree, and should not, in their individual capacity, be allowed to interfere with his discretion, except upon strong and clear reasons. If they are dissatisfied with the trustee, their remedy is to apply to have him re-

moved, under a provision in that behalf contained in the trust deed, and get a trustee to carry out their wishes if they can.

Afterwards, at the May term of the Circuit Court, application to compel the trustee to sell the road under the decree was renewed, when Judge Dillon, with the concurrence of Judge Love, again refused it, saying, after reciting the action of the Supreme Court in this case, that while the decision of that court is conclusive against the legal right of these parties to have this decree executed, at the same time there is no restraint in the decree, or in what has been decided in either court against its execution; that the appeal did not supersede it, and that the trustee is at perfect liberty, whenever he sees fit, to execute the decree; that as far as the court is concerned, considering the trouble this road had given it, by reason of the controversies and factions among the bondholders, it would be glad if the trustee could see his way clear to execute the decree, and get the road out of court, and into the hands of parties who could control it satisfactorily; that it should be understood that the trustee incurs no personal liability by executing the decree, and that the only question for the trustee to determine is whether the best interests of all the *cestuis que trust*, or bondholders, would be best promoted by now executing the decree, or by allowing it to stand until the determination of the appeal.

631. **In Kansas[1] the time and manner of making sales of railroads,** in all cases of foreclosure of mortgages or deeds of trusts, are provided for by statute. No sale shall take place at the instance of the trustee named in said mortgages or deeds of trust, by virtue of any judgment, decree, or interlocutory order entered therein, until after the expiration of three years from the entry or docketing thereof, unless a majority of all the holders in amount of bonds issued in pursuance of the terms of the mortgage or deed of trust, by virtue of which the foreclosure proceedings are had, and the judgment obtained, shall petition the trustee named in such mortgage or deed of trust to proceed to such sale, and said trustee shall file the said petition with the clerk of the court in which such judgment, decree, or order has been entered or

[1] Laws of 1876, ch. 111; Dassler's Stats. 1876, §§ 4627, 4631. See Laws of 1877, ch. 108, for act regulating procedure when the mortgaged property is situate in more than one county.

docketed, when the complainant in such suit may proceed to sell the property and franchises covered by said mortgages or deeds of trust, in accordance with the terms thereof, or as directed by the court.

In case any person other than the owner of said bonds shall sign such petition, representing himself as the agent, trustee, or proxy of said owner, his authority for signing the same must be in writing or printed, and executed by the owner of said bonds, and be duly acknowledged before some notary public, and be attested by the signature and official seal of such notary. If at the time of the entry of such judgment, decree, or order, no receiver shall have been appointed by the court in which the suit is pending, it is the duty of the court to appoint a receiver to take charge of, manage, control, and operate the property of said railway company, who shall be subject to the order of the court, and possess and exercise all the powers and duties of receivers generally, together with such special powers and duties as the said court shall delegate to him. If at the time of the entry of such judgment, decree, or order, a receiver shall have been heretofore appointed, the court may continue him as such receiver, with all the powers and duties as hereinbefore indicated.

Any sale made contrary to the provisions of this act is absolutely void, and shall convey no title or interest whatever to any purchaser.

III. *What Franchises pass by the Sale.*

632. The franchise to be a corporation. — The sale of the property and franchises of a railroad corporation, under a decree to satisfy a mortgage, does not pass to the purchaser debts due the corporation, nor does it destroy its corporate existence. For the purpose of collecting and paying debts the corporation still exists.[1]

The sale by one railroad company to another of a portion or division of an existing line of road with its franchises is construed to mean only the franchise of operating that part of the road, and not the franchise of being a corporation, and of suing and being sued as such. Both companies, after such sale, retain precisely the same corporate existence they had before, the one

[1] Smith *v.* Gower, 3 Mete. (Ky.) 171. See §§ 15, 16.

parting with and the other acquiring a specific piece of property with the franchise necessary to its use.[1]

Under a statute which provides that a corporation shall be dissolved by a mortgage sale of its franchises and property, an illegal and fraudulent sale does not work a dissolution.[2]

633. A mortgage by a railroad company does not pass any interest in land which it has occupied for its uses, but for which it has failed to pay the damages assessed. — Its interest in such land is a mere easement, and not an estate in the land subject to lien or execution. The land-owner's title to damages is paramount to a mortgage given by the railroad company before the damages have been assessed and paid. Although he allows the company to construct a road over his land, and to use it without payment of damages, and thus waives the trespass, he does not necessarily waive his claim for damages; and a prosecution of his claim to judgment is conclusive against such waiver. A sale of the road under a mortgage before the damages are paid does not divest the land-owner of his right to recover compensation for the occupancy of his land from the purchaser.[3]

But when a railroad company, being unable to agree with the owners of lands for a right of way, gives a bond with sureties and takes possession, a sale under a mortgage subsequently made gives the purchaser a clear title, and the land-owner is thrown back upon the bond for his damages.[4]

Of course, a right of way acquired by a railroad company by grant from the land-owner passes by a mortgage and by a foreclosure sale under the mortgage, and vests in the purchaser.[5]

634. Interest on purchase money. — When a purchaser at a judicial sale for the foreclosure of a mortgage is immediately put into possession of the property, he is chargeable with interest on the amount of the purchase money to the time of its payment.[6]

[1] Wright *v.* Milwaukee & St. Paul Ry. Co. 25 Wis. 46.

[2] White Mountains R. R. *v.* White Mountains R. R. 50 N. H. 50.

[3] Western Pennsylvania R. R. Co. *v.* Johnston, 59 Pa. St. 290; Pfeifer *v.* Sheboygan & Fond du Lac R. R. Co. 18 Wis. 164.

[4] Fries *v.* Southern Pa. R. R. & Mining Co. 85 Pa. St. 73; distinguished from Western Pa. R. R. Co. *v.* Johnston, 59 Pa. St. 290.

[5] Junction R. R. Co. *v.* Ruggles, 7 Ohio St. 1.

[6] Haven *v.* Grand Junction R. R. & Depot Co. 109 Mass. 88.

635. A purchaser at a foreclosure sale under a decree in chancery subjects himself to the jurisdiction of the court, and can be compelled to perform his agreement specifically. He undoubtedly has the corresponding right to appear and claim at the hands of the court such relief as the rules of equity proceedings entitle him to. If the court refuses to order the sale either to be set aside or completed, he may carry the matter by appeal to the appellate tribunal. The act complained of is not a mere ministerial duty, necessarily growing out of the decree which is being carried into effect, but the purchaser has in the course of the subsequent proceedings in the case acquired rights which the court is bound to protect, and has become a *quasi* party to the proceedings.[1]

A decree confirming a foreclosure sale, if it is final, may be appealed from.[2] Upon such an appeal from the Circuit Court of the United States to the Supreme Court, the refusal of the former court to accept a *supersedeas* bond, when offered during the term at which the decree was rendered, does not take from a judge of that court, or a justice of the Supreme Court, the power to approve one thereafter.[3]

IV. *Distribution of the Proceeds of Sale.*

636. In the distribution of the proceeds of a foreclosure sale, liens at law have precedence of equities. Thus, land was sold to a railroad company under an agreement that the vendor should receive as part of the consideration bonds of the company secured by a second mortgage to be issued. He delivered the deed, but before the mortgage was issued the company confessed certain judgments. The vendor then refused to receive the bonds because of the judgments, and the bonds were thereupon otherwise appropriated by the company. Upon a distribution of the proceeds of a foreclosure sale, it was held that the vendor, having rejected the bonds, had no further claim upon them, and the company could dispose of them as it pleased; and that the mortgage having been given to secure the bonds and the vendor not owning them, he had no lien, equitable or legal, through the mortgage

[1] Blossom *v.* Milwaukee, &c. R. R. Co. 1 Wall. 655. See 2 Jones on Mortgages, §§ 1642-1651.

[2] Sage *v.* Railroad Co. 96 U. S. 712; Butterfield *v.* Usher, 91 U. S. 246; Blossom *v.* Milwaukee, &c. R. R. Co. 1 Wall. 655.

[3] Sage *v.* Railroad Co. *supra*.

for the purchase money for which the bonds were to be delivered to him.[1]

637. Every bond is entitled to its pro rata share. — In the distribution of the proceeds of a foreclosure sale under a mortgage securing a series of bonds, the holders of the bonds share *pro rata* in the distribution; and if the holder of a bond is entitled to its proceeds, the holder of other bonds cannot set up mere informalities in the manner of its acquisition. The question of ownership, whether at law or in equity, is immaterial. The time and manner of the transfer of the bonds are not material; the only real question is whether each holder is entitled to the bonds he claims. Each bond carries with it a fractional interest in the proceeds of the mortgaged property, determined by the proportion the amount of the bond bears to the whole amount secured.[2]

638. In distributing the proceeds of a foreclosure sale the payment of coupons which matured before a general default may be preferred by the court when there is nothing in the mortgage requiring a *pro rata* distribution. Thus, upon the sale of the New York and Oswego Midland Railroad Company, Judge Blatchford ordered that unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest has been paid should be paid before coupons or interest falling due at a later date, and before the principal of any of the bonds; and that coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds.[3] On July first, 1873, the company made default in the entire amount of interest then falling due, amounting to $280,000, and never made any payment afterwards. The unpaid interest previously due amounted to about $30,500, which had matured at different times for several years previous. Against this preference it was contended that there was no principle, legal or equitable, upon which it could be made; that it was not shown that payment of the interest was ever demanded and refused; that no right to be paid the interest accrued until demand and refusal, and until then there was no default; that the company

[1] Rice's Appeal, 79 Pa. St. 168.

[2] Hodge's Appeal, 84 Pa. St. 359.

[3] Stevens *v.* N. Y. & Oswego Midland R. R. Co. 13 Blatchf. 412; and see Virginia *v.* Chesapeake & Ohio Canal Co. 32 Md. 501.

was justified in paying subsequently maturing interest, even though prior maturing interest remained unpaid, so long as the payment of such prior maturing interest had not been demanded; that he is prior in right who is prior in the time of presenting his demands, when presentment is required; and that those who, prior to July first, 1873, received their interest, received no preference as against those who did not receive their interest, because the latter did not demand it and the former did. The general principle was invoked, that, where general debts are secured by one and the same mortgage, and become due, and the mortgage is then foreclosed, they will be paid *pro rata* from the fund, if it is insufficient to pay the whole of them; and that the only exception to this rule is where the mortgage, by its terms, creates a preference in favor of some of the debts, or where the original creditor, as to any which he has assigned, has designed to confer a right of prior satisfaction on the assignee.

In support of the preference it was contended that as to the interest which matured prior to July first, 1873, inasmuch as some of the parties entitled to it had received it, and some had not, the former will have received a preference, unless the latter are now to be put on an equal footing. To this it was replied that there really was no preference; that, so long as the debtor was solvent, every party entitled to interest was paid as he presented his matured claim; that, if he did not present it, he took the risk of the debtor's becoming insolvent; and that he had no special property in, or lien on, the funds of the debtor, which could require the debtor to set apart funds sufficient to pay undemanded matured interest which fell due at an earlier date, before paying demanded matured interest falling due at a later date. Judge Blatchford, delivering the opinion of the court, said: "I do not think any distinction can be made between interest which matured before July first, 1873, and interest which matured on that day, growing out of the fact that payment of the latter was demanded and refused, or a demand was waived, and that the former was not demanded. I do not see how any diligence of those of a given class who were paid their interest, in asking to have it paid, can be imputed as laches to others of the same class who did not ask to be paid their interest, so as to work a virtual preference in favor of the former. To give to the latter their interest in full, before paying the principal of the bonds, is only to put all those in a given

class entitled to interest on an equal footing; and to put them on such equal footing requires, also, that interest maturing at an earlier date shall be paid before interest maturing at a later date. Here are special equities, it seems to me, which would be violated, if such an inequality were left to exist as the exclusion from the full payment of interest of some of a given class. There is nothing in the terms of the mortgage, in this case, which requires such exclusion. On the contrary, the mortgage provides that, after default, the mortgagees shall sell so much of the mortgaged property 'as shall be necessary to pay and discharge the principal and interest, according to the tenor thereof,' of all the bonds issued, and shall, out of the moneys arising from such sale, pay the principal and interest which shall then remain due and unpaid on the issued bonds. The words, 'according to the tenor thereof,' may very well be held to embrace the payment of interest, according to the times of the semi-annual recurrences of interest, and in such order. Certainly, there is nothing in these words, or elsewhere in the mortgage, that forbids a course which is absolutely necessary, unless a result is to be effected which will not be a payment of interest according to the tenor of the bonds, but will leave some part of a given instalment of interest paid in full, and the rest of it not paid in full. In the case of *Dunham* v. *Cincinnati, Peru, &c. Ry. Company*,[1] the mortgage provided, that in case of default and a sale, all bonds, and the interest accrued thereon, should be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of sale. Hence it was held that there could be no preference of past due coupons over the principal of the bonds. No case was cited on the argument which decides the above question adversely to the view I take. Most of the cases cited were not cases of coupons or interest on numerous bonds secured by mortgage, and none of them were cases where some interest in a given class had been paid and the rest not paid, and the fund was insufficient to pay all the principal and interest due. The case of *Sewall* v. *Brainerd*[2] was not such a case, nor was the case of *Miller* v. *Rutland & Washington Railroad Company*;[3] and, in the latter case, no preference was claimed."

The coupons which fell due July first, 1873, were not paid by the railroad company, but they were detached from the bonds

[1] 1 Wall. 254. [2] 38 Vt. 364. [3] 40 Vt. 399.

and cashed by other parties. They were regarded by the court as having a special equity. "It was through the advance of money to cash those coupons in the hands of the holders of the bonds to which they belonged, that such holders obtained the money for those coupons. On such advance, those coupons passed into the hands of those who now hold them. But for such advance, the coupons, in the hands of the original holders of them, would not have been worth their face value, as they were made to be by such advance. The original holders of such coupons must be regarded as still holding the bonds to which such coupons belonged, or, if not, those who hold such bonds and subsequently maturing coupons belonging thereto must be held to be subject to the same equities with such original holders. No special reasons are shown, in the evidence, why, as against any of such holders, the present holders of coupons of July first, 1873, are estopped from claiming priority. Those who had their coupons of July first, 1873, cashed by means of such advance, retained the money, and, to permit them now to exclude the holders of such coupons from being paid in full, and put on an equality with the registered interest of July first, 1873, which was paid in full, would be to permit them to work an inequality which would be unjust."[1]

639. **One who holds bonds as collateral security should receive only the amount of his loan** and interest, and not the full amount of the bonds or of the dividend upon them.[2] This principle was applied to a case where a person authorized to raise money on the negotiable bonds of a corporation borrowed money on his own note, and pledged bonds to the lender, and applied the money to the use of the corporation. In a distribution of the proceeds of a foreclosure sale, the lender was not allowed to receive the full amount of the bonds and account to the person who negotiated them, but was only entitled to his loan and interest.[3]

640. **Upon the foreclosure of a railroad mortgage no part of the proceeds of the foreclosure sale can be distributed among the stockholders** of the corporation, in accordance with any previous arrangement between them and the mortgagees, as against the general creditors not secured by the mortgage. Sub-

[1] See §§ 328-331.

[2] See § 435.

[3] Rice's Appeal, 79 Pa. St. 168.

ject to the lien of the mortgages the property of the road is in the corporation; and if anything remains upon a foreclosure of a mortgage after discharging the mortgage liens it belongs to the corporation as a trust fund for the benefit of its general creditors, and does not belong primarily to its stockholders. The stockholders are not entitled to receive anything from a distribution of the proceeds of a foreclosure sale. The corporation is entitled to the surplus after the payment of its debts, and the stockholders are entitled to a share of the surplus only after the payment of all the debts of the corporation.

These principles are illustrated by a case decided by the Supreme Court of the United States upon appeal from the Circuit Court for Iowa.[1] The Mississippi and Missouri Railroad Company having incumbered its property by five several mortgages securing bonds to the aggregate of $7,000,000, a sum greatly exceeding the value of the property, became insolvent, and the Chicago and Rock Island Railroad Company made overtures for the purchase of the road, offering to give for it $5,500,000, a sum more than its value, upon the condition of getting title at once. The only way of accomplishing this seemed to be by a foreclosure of one of the mortgages; and as it was supposed that it was in the power of the stockholders to delay the foreclosure an arrangement was made between the stockholders and the mortgagees whereby the different classes of bondholders were to receive specified amounts, ranging from thirty to one hundred per cent. of the amount of their bonds, and the stockholders were to receive sixteen per cent. of the par value of their stock, amounting to $552,400, but no provision was made for the payment of the general creditors of the company. Pursuant to this agreement the property was sold under foreclosure, and the purchaser conveyed it to the Chicago, Rock Island, and Pacific Railroad Company, a new corporation formed under the laws of Iowa to supersede the two companies before named. Before the sum arranged for division among the stockholders was distributed, certain judgment creditors of the first named company appeared as claimants of this fund. The court held that this arrangement was fraudulent as against general creditors of the company, who were entitled to the undistributed fund; and it was regarded as immaterial that the property was mortgaged for more than it was

[1] Railroad Co. *v.* Howard, 7 Wall. 392.

worth, and that if it had been sold under an ordinary foreclosure, without any arrangement between the mortgagees and stockholders, the whole proceeds of the sale would have belonged to the mortgagees.

641. Any surplus of proceeds of a foreclosure sale remaining after satisfying the mortgage for the payment of which the sale was made belongs to the holders of subsequent liens upon the property, and in absence of such to the corporation owning the equity of redemption.[1] In the hands of the corporation such surplus is subject to its unsecured debts. The corporation takes it as a trust for its general creditors, and its stockholders have no claim upon it until all its debts are satisfied. In this respect the rule is the same although the sale be made in pursuance of an arrangement between the mortgage bondholders and the stockholders, whereby the bondholders were to receive eighty-four per cent. of the proceeds in full satisfaction of their bonds, and the remainder was to be distributed among the stockholders. The lien of the mortgage being discharged by the payment of such percentage as a compromise, whatever remains of the mortgaged property belongs to the corporation, and is subject like its other assets to the payment of its debts. To a creditor's bill to prevent the distribution of such fund among the stockholders of the corporation before its debts are paid, and to subject the fund to the payment of its debts, the stockholders are not necessary parties. The corporation holds the fund in trust for the benefit of its creditors in the first instance, and for the benefit of its stockholders secondarily.[2]

V. *Setting aside of Sale.*

642. Proceedings to set aside as fraudulent a decree of foreclosure, and a sale under it, must be commenced within a reasonable time after such sale. What length of delay will defeat a recovery must depend upon the particular circumstances of each case. The Supreme Court of the United States in one case held that a suit commenced five years after a sale under a railroad mortgage did not show a sufficient degree of diligence to justify the overthrow of the decree of foreclosure.[3] If ignorance

[1] See 2 Jones on Mortgages, §§ 1684–1698.

[2] Railroad Co. *v.* Howard, 7 Wall. 392.

[3] Harwood *v.* Railroad Co. 17 Wall. 78. See 2 Jones on Mortgages, § 1674.

of the frauds be alleged as an excuse for the delay, the bill should show specifically when the knowledge of the frauds was first obtained, or should give a satisfactory reason why such knowledge was not sooner obtained.[1]

When a suit is brought to set aside as fraudulent a foreclosure sale after a long delay, such for instance as five years, the cause of the delay should be specifically set out. An allegation in general terms of ignorance of the fraudulent acts and arrangements relied upon is insufficient. It must appear by allegation and proof that the complainant has not slept too long upon his knowledge of the fraud.[2]

Mortgagors may obtain relief from a fraudulent sale, if they apply for it within a reasonable time after discovering the fraud. Thus, where a mortgage trustee received a bribe from the purchasers at the sale to induce him to act in their interest, and the mortgagors remained ignorant of the bribery for eight years, a bill brought within two years after this discovery was deemed to be within a reasonable time.[3]

643. **The right of a corporation to avoid a sale of its property, by reason of the fiduciary relations of the purchaser,**[4] must be exercised within a reasonable time after the facts relating to it are known, or can by due diligence be ascertained. What this time is has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale, and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised.[5] Thus, a very much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement,

[1] Harwood *v.* Railroad Co. 17 Wall. 78.

[2] Harwood *v.* Railroad Co. *supra.*

[3] White Mountains R. R. *v.* White Mountains R. R. 50 N. H. 50; and see Sullivan *v.* Portland & Kennebec R. R. Co. 94 U. S. 806.

[4] See 2 Jones on Mortgages, §§ 1636, 1876–1888.

[5] Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, per Miller, J.

and in the value of which there can be but little change, than would be allowed in respect to property which is subject to rapid, frequent, and violent fluctuations, such as mining property, or property adapted to the production of mineral oil from wells. Therefore, where a director of a corporation who was secured by a trust deed of such property purchased the property at a foreclosure sale under this deed, and the sale was fairly made, and all the facts on which their right to avoid the contract depended were immediately known to all the stockholders, who refused to join in the purchase, or to pay assessments then made on their stock, the corporation was not allowed nearly four years afterwards, when the purchaser, taking all the risk, had made his investment profitable, to hold the purchaser as trustee of the property, and liable to account for the profits during the time he had been in possession of it.[1]

644. **A director of a corporation having in good faith made a loan to it and taken security in the form of a deed of trust of real estate may properly purchase** the property at a sale under the power. He is not in such case both seller and buyer. When a trustee is interposed who makes the sale, and who has the usual powers necessary to see that the sale is fairly conducted, he is in this respect the trustee of the mortgagor, and must be supposed to have been selected by him for the exercise of this power. The *cestui que trust* is at liberty to bid, subject to the rules of fairness, which are the more rigid in proportion as the relation he bears to the mortgagor is the more confidential; for, if he could not bid, he would be deprived of the only means which his contract gave him of making his claim out of the security.[2]

It is not illegal for a director of a company to buy its securities directly of the company at a discount, provided he pays the same price at which they are issued to other persons; and therefore he is not liable to the company for the difference between the price paid and par. Such a purchase does not fall within the principle of equity which prohibits an agent, or director, or any person in a fiduciary character, and having power and influence in a company, from making a profit by his dealings with it.[3]

[1] Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587.

[2] Twin-Lick Oil Co. *v.* Marbury, *supra*.

[3] Compagnie Générale de Bellegarde *in re*, L. R. 4 Ch. D. 470.

645. A sale by a bondholder in fraud of other bondholders will be set aside. — One holder of a few bonds out of a large amount issued by a corporation, and secured by a mortgage of its property, has no right to use the mortgage as an instrument by which he may become the owner of the mortgaged property at a grossly inadequate price, leaving the other bonds unpaid. It is his duty, if he makes use of the mortgage security at all, to make it productive of the most that can be obtained for all who are interested in it. Community of interest between the bondholders having a common interest in the same security involves mutual obligations. If one of them seeks to appropriate the security exclusively to himself, or to make a profit out of it at the expense of those whose rights in it are the same as his own, he is guilty of fraud.

These principles are illustrated in a case which came before the Supreme Court of the United States from Louisiana.[1] The Vicksburg, Shreveport, and Texas Railroad Company, in 1857, issued bonds to the amount of $761,000, and secured them by a mortgage upon its railroad and franchises and personal property, together with more than four hundred thousand acres of land. On the 23d of December, 1865, the holder of four of the mortgage bonds, upon which coupons to the amount of $720 were due and unpaid, obtained from a judge of a court of the State of Louisiana, at chambers, an *ex parte* order of sale. His petition did not disclose the name of any other bondholder; and no notice to the other bondholders, the most of whom resided in other states, was asked for or given. The sale was fixed for the earliest possible day, the 3d of February, and the sheriff advertised the sale in one newspaper published in the town of Monroe, and by posting a copy of the advertisement on the church door, and another at the door of his office. By a law of the state the prop-

[1] Jackson *v.* Ludeling, 21 Wall. 616. It does not appear that the mortgage in this case was made to trustees for the bondholders. The mortgage, as well as the proceedings upon it, or upon the bonds, show peculiarities of the law of Louisiana different from the common and statute law of any other state in these respects. Under the practice in Louisiana, the proceedings upon a mortgage may be altogether *ex parte*. The mortgage being regarded as in the nature of a confession of judgment, the judge grants an execution as a matter of course upon the production of the bonds secured, and authentic evidence of the mortgage. This process is known under their Civil Code as executory process. See, in this connection, New Orleans R. R. Co. *v.* Morgan, 10 Wall. 256.

erty seized was required to be appraised, and could not be sold for less than two thirds of its appraised value. It consisted of a railroad about one hundred and ninety miles in length, with numerous stations, buildings, warehouses, depots, and depot grounds, cars, locomotive engines, wagons, machinery, utensils, bills receivable to the amount of more than $40,000, unpaid stock subscriptions exceeding $320,000, and a large land grant of several hundred thousand acres, together with the franchise of the company. They met for the appraisal of all this property only on the day of sale. They were appointed by the plaintiff in the suit, and by the acting president of the road, upon whom service had been made, both of whom became purchasers at the sale. They appraised the entire property at $75,000, and the sale proceeded. The sheriff exacted an illegal and onerous condition, that the purchaser should pay cash to meet the interest coupons then due, and should give security for the credit portion of the bid which covered the immature interest and bonds. The property was struck off for $550,000, but the bidder failing to pay at once the interest coupons then due and presented, the sheriff immediately set up the property again in bulk, and sold for $50,000 property upon which had been expended nearly $2,000,000, together with a large stock subscription, a large grant of lands, and considerable movable property. It appeared that the bondholder who instituted the proceedings, and several persons who became the purchasers at the sale, had entered into an agreement and combination to divest the company of its property and obtain it themselves at a sacrifice. Several of them were directors and other officers of the road. After the sale they entered into possession of the property and organized a new corporation. The other bondholders, who resided principally in other states, then brought a bill in equity to set aside the sale. The Supreme Court of the United States, in setting aside the sale, declared that the property was sacrificed by means of an unlawful and widespread combination, and that the directors who were parties to it were guilty of an inexcusable violation of confidence. The fraud and trust were entirely outside the record. The sale was conducted under the forms of law. The irregularity of the proceeding was in the fraudulent combination to deprive the great body of the bondholders of their property in the road for the benefit of persons in whom, from their official connection with the road, or from

their community of interest, these bondholders had the right to rely for faithfulness to trusts and to common obligations.

646. **A mortgage trustee in possession cannot without express authority become a purchaser.** — Inasmuch as a trustee having the possession and management of a railroad corporation for the protection of bondholders is a trustee not only for them, but for the corporation which made the mortgage, he cannot properly purchase the mortgaged property at a foreclosure sale even under a subsequent mortgage; and if he does so purchase the property, the corporation may redeem it upon paying the amount of his bid with interest thereon; and the trustee will be required to account for the earnings of the property while it was in his possession. In such case the corporation is entitled to have the account stated, and a reasonable time allowed for redemption after the balance has been ascertained.[1]

647. **The fact that the purchasers at a foreclosure sale of the property of a railroad company are bondholders and creditors** of the company who have entered into an agreement to make the purchase and to reorganize the company does not of itself affect the validity of the sale, or subject the property in their hands to any trusts in favor of other creditors. Such creditors of the corporation are *bonâ fide* purchasers, unless there be something else to destroy their character as such. The doctrine recognized in *Railroad Co.* v. *Howard*,[2] that equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and that it may be pursued by the creditors into whosesoever possession it may be transferred, unless it has passed into the hands of a *bonâ fide* purchaser, has no application to a case where the purchasers occupy no relation of trust toward the corporation or its other creditors, and are in no respect incompetent to purchase and hold the property in their own right, and to agree among themselves as to the disposition to be made of it. Such purchasers occupy the position of *bonâ fide* purchasers when there is no fraud in their agreement to make the purchase and reorganization, and the stockholders of the old company derive

[1] Racine & Miss. R. R. Co. *v.* Farmers' Loan & Trust Co. 49 Ill. 331; Ashhurst's Appeal 60 Pa. St. 290.

[2] 7 Wall. 392.

no benefit from it, and the foreclosure and the sale under it are regular and fair.[1]

Neither is a creditor to whom the old company was under obligation to deliver additional bonds, but to whom they never were delivered, for this reason entitled to share in the benefits of such purchase by an association of bondholders. Although as between the old company and the creditor equity would consider that done which ought to have been done, this rule does not affect the rights of bondholders who made their agreement and purchase in reference to what the company had actually done, and especially where the creditor seeking to establish this equity against the bondholders was himself as an actual holder of some of the bonds a party to the contract.[2] Bondholders who have become parties to a scheme for the purchase of the mortgaged road and the formation of a new company, and have in pursuance thereof surrendered their bonds in exchange for stock and bonds of such new association, are not in a position to take exception to the foreclosure sale.[3]

648. Purchasers of a railroad at a foreclosure sale, who have conspired with the directors of the road in effecting a fraudulent sale, will be held as trustees for the benefit of the parties in interest to the full value of the property purchased. The Milwaukee and Superior Railroad Company made its promissory notes, indorsed by four of its directors, for the price of iron furnished for the road, and secured them by a pledge of its bonds for $42,000. Similar bonds to the amount of $280,000, which had never been issued, were sealed up and deposited with a firm, not to be issued until this debt for iron had been paid, and twenty-seven miles of the road built. The company having built about five miles of road became insolvent. Suit was thereupon brought upon the notes against the directors who had indorsed them. These directors then procured at their own expense a suit to be commenced to foreclose the mortgage. They also arranged with certain persons to purchase this claim, under an arrangement whereby the purchaser should acquire the entire property of the road. In furtherance of this plan the $280,000 of bonds were delivered, by resolution of the board of directors, of whom four

[1] Vose *v.* Cowdrey, 49 N. Y. 336; and see Ashhurst's Appeal 60 Pa. St. 290.

[2] Vose *v.* Cowdrey, *supra*.

[3] Crawshay *v.* Soutter, 6 Wall. 739.

constituted a quorum, to the holders of the notes, as additional security. These creditors had not asked for further security, and refused, at first, to receive the bonds, and in fact did not receive them till they had sold their claim. These bonds, then in the hands of the proposed purchasers of the road, were sold on short notice at public auction, and bought by themselves at a small price; and after the decree of foreclosure they presented these bonds before the master, who allowed them as a lien on the road. They then purchased the entire railroad and its property for $20,000, and afterwards stripped it of its iron and all other movable property, which they sold and realized large sums of money for. Other creditors obtained judgment against the company, and brought a bill, alleging the sale to be fraudulent, and seeking to reach the franchises and property. The Supreme Court of the United States held the purchasers to be trustees of these creditors for the value of the property less the sum actually paid for a lien upon it, and chargeable with interest on the difference from the day of sale. The scheme to acquire the property of this corporation was characterized as fraudulent in its inception, and fraudulent at every step in the progress of its execution.[1]

649. A foreclosure sale will be set aside as fraudulent where it appears that the notice of sale misstated the sum due under the mortgage, as for instance by setting forth that the amount of the bonds secured was $2,000,000, with $70,000 interest, when in fact less than $200,000 was outstanding in the hands of *bonâ fide* holders for value, and the remainder had either not been issued at all or had been through fraud transferred to the directors at merely nominal prices. Such a notice is calculated to destroy all competition among bidders, and indeed to exclude from the purchase every one except those engaged in the perpetration of the fraud; and where the purchase at such sale is made in behalf of the bondholders, who organize themselves into a company, they will be perpetually enjoined from setting up any right or title under it; but the mortgage will remain as security for the bonds in the hands of *bonâ fide* holders for value.[2]

650. A sale before default passes only the mortgage title. —

[1] Drury *v.* Cross, 7 Wall. 299.

[2] James *v.* Railroad Co. 6 Wall. 752.

See 2 Jones on Mortgages, §§ 1668–1681, 1906–1922.

Under a mortgage or deed of trust in the usual form giving a power of sale upon a default in payment of the debtor's interest secured, a sale before such default is not effectual in cutting off the right of redemption. It can confer nothing beyond the legal title in trust for the benefit of the grantor. A purchaser is put upon inquiry to ascertain whether there has been a default, and whether the default still exists at the time of the sale.[1]

651. The trustee who obtained the decree of sale should be made a party to a suit in equity brought by stockholders of a railroad company to set aside as fraudulent proceedings regular on their face prosecuted by the trustee to foreclose it, after such proceedings have been completed. He must be given an opportunity to sustain his decree or to rebut the alleged fraud, and his absence is a fatal defect. "The judgments of courts of record would be scarcely worth obtaining if they could be thus thrown lightly aside." [2]

It may be necessary to make others besides the plaintiff in the original suit parties to the bill to set aside the sale. Thus the majority of the bondholders and stockholders of the Mississippi and Missouri Railroad Company having agreed to sell the road for a stipulated price, and to divide the proceeds among all the stockholders and creditors according to a plan agreed upon, and other stockholders and bondholders having refused to agree to the arrangement, in order to get around their opposition, a sale was effected through the action of the majority, by an amicable foreclosure of one of the five mortgages upon the road, the trustees in one of the mortgages being complainants, and those in the other mortgages, with the corporation, being defendants. The dissatisfied stockholders and bondholders then filed a bill against the purchaser and the corporation whose road had been sold, not making, however, any of the trustees or any of the consenting stockholders parties, charging collusion in the sale, and praying that it might be set aside. This bill was held by the Supreme Court of the United States fatally defective for want of proper parties.[3] The proceeds of the sale had been distributed between the different sets of bondholders according to the agreement pre-

[1] Chicago, Rock Island & Pacific R. R. Co. v. Kennedy, 70 Ill. 350.

[2] Harwood v. Railroad Co. 17 Wall. 78.

[3] Ribon v. Railroad Companies, 16 Wall. 446.

viously made between them. Their rights would therefore be affected by the suit to set aside the sale. The presence of the trustees of all these mortgages was therefore indispensable. To a bill to set aside a foreclosure sale under decree of court, the plaintiff in the foreclosure suit is a necessary party.[1]

652. The legislature has no power to confirm a fraudulent sale of the mortgaged property of a corporation. Restrictive statutes passed to cure defects in conveyances are purely remedial in their nature, their purpose being to correct mistakes, in order that the intention of the parties may be carried out; and they accomplish only what, upon principles of natural justice, a Court of Equity might decree. But such legislation cannot cure fraud in a sale.[2]

[1] Harwood *v.* Railroad Co. 17 Wall. 78.

[2] White Mountains R. R. *v.* White Mountains R. R. 50 N. H. 50, 57.

CHAPTER XXIII.

RIGHTS OF PURCHASERS AT FORECLOSURE SALES UNDER RAILROAD MORTGAGES.

I. Purchasers are not liable for the debts of the old company, 653–660.

II. Organization of purchasers into a new corporation, 661–684.

I. *Purchasers are not liable for the Debts of the Old Company.*

653. There is no privity between a new corporation formed in accordance with statute authority by the purchasers of a railroad upon foreclosure, and the old corporation whose property was foreclosed; and the new company is not liable for the debts of the old. Neither does the fact that the stockholders of the original company, by an arrangement subsequent to the purchase, were allowed to become stockholders of the new company without payment of any money, impose upon the new company the debts of the old.[1] There might be a preliminary agreement, or such an arrangement with the stockholders of the old company, or such admissions of liability as would charge the new company with a trust of the assets for the creditors of the old company. Such was the case of *Railroad Company* v. *Howard*,[2] where not only was there a preliminary agreement to sell the property to a particular company, and to make the proceeding to foreclose the mortgage ancillary to the agreement, but after the property vested in the purchaser, the latter admitted the possession of sixteen per cent. of the fund in hand to belong to the stockholders of the old company; and the question being whether the stockholders or the creditors of that company should be entitled to this fund, it was, of course, held that the equity of the creditors was superior to that of the stockholders.

Corporate existence, and the right to exercise the power of eminent domain, can only be derived from legislative enactment;

[1] Stewart's Appeal, 72 Pa. St. 291.

[2] 7 Wall. 392.

and before a company can demand a judgment condemning lands to its use, it must show that both have been conferred upon it by a valid law, and that it has substantially complied with the conditions which the law has annexed to the exercise of the power. The purchasers of a railroad upon a foreclosure sale, in the absence of a statute conferring upon them corporate powers, are not invested with any corporate capacity whatever. The foreclosure sale does not itself pass the franchise to be a corporation.[1]

654. **Purchasers of a railroad under a mortgage or execution sale are not regarded as continuing the old corporation.**[2] The effect of legislation empowering the mortgage trustees and the bondholders, together with their associates, to purchase at a foreclosure sale the franchise and property of the old company, and investing them with all the corporate powers and privileges of the old company, but not giving the stockholders under the old any rights in the new company, is to create a new and distinct corporation, capable of owning and using that which is conveyed under the sale, and not to reorganize the old company. Such new company takes what it purchases, subject to no liens or claims save such as may be paramount to the mortgage under which the sale is made.[3]

The corporation, as a legal entity, does not vest in the purchasers upon a sale under a mortgage, or by an assignee in bankruptcy, nor do they become corporators or stockholders in the corporation,[4] but by virtue of a statute the purchasers may immediately become a body corporate, with all the rights and privileges of the old corporation. The statutory directions in regard to the organization of the new corporation may not be conditions of its being; and irregularities in the organization are not necessarily fatal to the being of the corporation under such a statute.

[1] Atkinson *v.* Marietta & Cincinnati R. R. Co. 15 Ohio St. 21; and see Mendenhall *v.* West Chester & Phila. R. R. Co. 36 Pa. St. 145, note; State *v.* Rives, 5 Ired. (N. C.) L. 297; State *v.* Bank of Md. 6 G. & J. (Md.) 205; Commonwealth *v.* Tenth Mass. Turnpike Co. 5 Cush. (Mass.) 509; Bruffett *v.* Great Western R. R. Co. 25 Ill. 353.

[2] Vilas *v.* Milwaukee & Prairie du Chien Ry. Co. 17 Wis. 497; Smith *v.* Chicago & North Western Ry. Co. 18 Wis. 17; Commonwealth *v.* Central Passenger Ry. Co. 52 Pa. St. 506.

[3] Morgan County *v.* Thomas, 76 Ill. 120.

[4] Metz *v.* Buffalo, Corry & Pittsburg R. R. Co. 58 N. Y. 61; and see Wellsborough & Tioga Plank Road Co. *v.* Griffin, 57 Pa. St. 417.

The organization is but the creation of an agency by which the corporation can act, and presupposes the existence of the corporation.[1]

A subscriber to the stock of a road reorganized after a foreclosure sale of an uncompleted railroad cannot avail himself of conditions in the charter of the original road for the building of the road between certain terminal points, in order to obtain a release from his subscription. The new company is under no obligation to complete the whole road, but may take and use the road in the condition in which it was sold.[2]

655. **A new corporation formed by purchasers is not liable for the debts of the old corporation,** to whose property and franchises it has succeeded by purchase and legislative authority, unless such debts have been expressly assumed, or the new corporation is the same corporate body as the old, having only a new name. Thus, the St. Paul and Pacific Railroad Company was sued upon coupons made by the Minnesota and Pacific Railroad Company, under the allegation that the latter company not having completed its road as required by statute, the name of the corporation was changed to that of the former company, which was really the old corporation under a new name. Judge Dillon, after an examination of the legislative and constitutional history of those corporations, was of opinion that it was not the legislative intention to continue the old corporation, but to create a new corporation, and to give it the property and franchises of the old corporation, so far as they were held by the state.[3]

A new company organized by the purchasers of a railroad upon foreclosure sale is not liable for the debts of the old company, though by statute the new company is clothed with the same powers as the old company.[4] The fact that the sale took place in pursuance of an agreement between the old company, which made

[1] Commonwealth *v.* Central Passenger Ry. 52 Pa. St. 506.

[2] Chartiers Ry. Co. *v.* Hodgens, 85 Pa. St. 501.

[3] Hopkins *v.* St. Paul & Pacific R. R. Co. 2 Dill. 396; and see Secombe *v.* Milwaukee & St. Paul Ry. Co. Ib. 469; North Hudson County R. R. Co. *v.* Booraem, 28 N. J. Eq. 450.

[4] Gilman *v.* Sheboygan & Fond du Lac R. R. Co. 37 Wis. 317, 319; Vilas *v.* Milwaukee & Prairie du Chien Ry. Co. 17 Wis. 497; Wright *v.* Milwaukee & St. Paul Ry. Co. 25 Wis. 46.

the mortgage, its bondholders and the mortgage trustees, that a foreclosure sale should take place, and that the stockholders of the old company, and its unsecured creditors, should become stockholders in the new company, does not show that the new company formed by the purchasers is merely a reorganization of the old company, and does not enable a creditor of the old company to assert his claim against the new except in pursuance of some agreement.[1]

There is no doubt that an agreement for reorganization might be made which would modify the effect which a foreclosure sale would otherwise have. But the natural effect of a foreclosure sale is not neutralized by facts which show merely an agreement for the formation of a new company, in which those interested in the old might become interested in a certain way.[2]

The effect of a sale of the property and franchises of a railroad company is not different from that of a sale under an ordinary mortgage. The purchaser does not thereby become liable to pay any of the debts of the mortgagor, though, if a prior lien exists upon the property, it may of course be enforced. It does not matter that the debt is a judgment for damages for land taken by the railroad company for its roadway, and that the purchasers at the foreclosure sale bought with notice of such outstanding judgment. The fact that the purchaser is operating the road across the lands of the plaintiff does not alter the case, so far as this question of liability upon the judgment is concerned. The plaintiff may have a remedy in another form of action, to compel the company to make compensation for his property, or stop running its cars over it. A Court of Equity would doubtless afford such remedy in a case where it appeared the new company elected to adopt the original taking, and continued to occupy and use the land for the purposes of its road; for the right of the original owner to compensation for his property is paramount, and it is idle to say that an unsatisfied judgment against an insolvent corporation afforded him any compensation. But the ground of liability of the new company is not upon the judgment against the old corporation, but is founded upon the principle that

[1] Smith *v.* Chicago & North Western Ry. Co. 18 Wis. 17; Sullivan *v.* Portland & Kennebec R. R. Co. 94 U S. 806.

[2] Smith *v.* Chicago & North Western Ry. Co. *supra.*

it has seen fit to adopt and ratify the original taking, and therefore is bound to make compensation.[1]

656. Damages resulting from the negligence of those operating a road intermediate the time the property of a railroad company is sold, and the confirmation of the sale by the court, are not chargeable to the purchasers, unless they have taken actual possession of the property. Before the confirmation of the sale and conveyance of the property, the purchasers have no right to intermeddle with the road or any of the property purchased. If they do not in fact assume the control of the employees and servants of the road, they are not responsible for their negligence.[2] But after the sale has been completed, the purchaser is responsible for injuries resulting from the operation of the road, and the former company is no longer liable, for its power over the property has ceased, and with its power has also ceased its liability for the proper management of the road. If the purchaser does not become a corporation, but operates the road as an individual in his own name or as the former company, he cannot be sued in the name of that company, but the suit should be in his own name.[3]

657. Condition precedent imposed by statute that new corporation shall assume debt of old. — When the purchasers of a railroad are incorporated under a special act which provides as a condition precedent to its operation that the new company shall pay all claims against the old corporation for work done and materials furnished, the new company, when it has accepted the act and succeeded to the franchises of the old company, is liable for all such claims. The acceptance of the act amounts to an assumption of payment of all claims provided for in the condition. It is not necessary that the act should provide a specific remedy in favor of the creditors, whose claims the company is made liable for, because whenever a statute imposes a duty or liability, the common law affords the remedy, either by an action of debt when the demand is for a sum certain, as in the case of a judgment, or

[1] Gilman v. Sheboygan & Fond du Lac R. R. Co. 37 Wis. 317. The case of Pfeifer v. Sheboygan & Fond du Lac R. R. Co. 18 Wis. 155, is distinguished, but so far as it conflicts is overruled.

[2] Metz v. Buffalo, Corry & Pittsburg R. R. Co. 58 N. Y. 61.

[3] Wellsborough & Tioga Plank Road Co. v. Griffin, 47 Pa. St. 417.

otherwise by an action of assumpsit.[1] If the claim be in the form of a judgment against the old company, it is not necessary in an action upon it to aver that the judgment was well founded; for the presumption is that the judgment is correct.

A statute making a consolidated corporation liable for all debts of each company entering into the arrangement is not retrospective in its operation, but is designed to apply only to companies consolidated after its passage.[2]

658. **To prove a new promise by the purchasers of a railroad and its franchises to pay a debt owing the original company**, there must be shown some action on the part of the directors from which a promise can be clearly inferred. An agreement to issue stock to the creditors of the former corporation in case a reorganization should be effected does not give rise to any claim on their part to payment in money; and a certificate by the secretary of the company that a certain amount was due a creditor of the old company would be insufficient to bind the new company, unless he had been empowered to adjust the claim.[3]

659. **Debts incurred by a corporation cannot be released by legislative enactment**, whether they be debts incurred by contract, forfeiture, or penalty. A repeal of the charter of the corporation and a transfer of its power to a different body cannot have this effect. The creditors of the corporation have still an undoubted right to enforce their claims. To release a corporation from its liabilities by legislative enactment would be to impair the obligation of contracts existing between it and its creditors; and this is a prohibited power. Moreover the charter of a company is a contract with which the legislature cannot interfere without consent. A sale of its property does not disorganize it. It still continues a corporation so far as its creditors are concerned. Neither can the legislature transfer the indebtedness of one corporation to another without the action of these bodies; and even then the corporation that incurred the indebtedness is not released without the consent of its creditors.[4]

[1] St. Louis, Alton & Terre Haute R. R. Co. *v.* Miller, 43 Ill. 199.

[2] Hatcher *v.* Toledo, Wabash & Western R. R. Co. 62 Ill. 477.

[3] Am. Cent. Ry. Co. *v.* Miles, 52 Ill. 174.

[4] Bruffett *v.* Great Western R. R. Co. 25 Ill. 353; Hatcher *v.* Toledo, Wabash & Western R. R. Co. 62 Ill. 477.

660. A purchaser at a foreclosure sale of the franchises, property, and immunities of a railroad company acquires a right of exemption from taxation which appertained to the corporation by its charter. The charter of a corporation, when accepted, becomes a contract which cannot afterwards be impaired by legislative action unless the power to change the charter is reserved. The immunity from taxation is an important element of the value of the corporate property and of the security. A sale of the franchises and property of the corporation without the exemption would practically repeal the exemption, and restore to the state the right of taxation, which it did not have so long as the old company continued to be the owner of the property. If this exemption from taxation be regarded as a right appurtenant to the corporation to which it is granted, then the right will pass to a purchaser under a description of its franchises and property.[1] Yet the Supreme Court of the United States has held that immunity from taxation is not itself a franchise of a railroad corporation which passes as such, without other description, to a purchaser of its property.[2] The exemption in this case was of the capital stock, works, workshops, warehouses, vehicles of transportation, and other appurtenances of the company. It is certainly clear, as stated in that case, that a purchaser of an engine or car from the company would not hold such property exempt from taxation. The case is to be distinguished from one where the entire road, franchises, and property of a railroad are exempted from taxation, and all its rights, property, and appurtenances are sold as a whole. The purchaser in such case acquires the right to use the property as the old company had the right to use it. Especially must this be the case when the sale is made under a statute expressly conferring on the purchaser the rights, privileges, and immunities of the corporation sold. Thus, the Knoxville and Ohio Railroad Company, whose charter contained an exemption from taxation, borrowed money from the State of Tennessee under its Internal Improvement Act, and a default having occurred, a statute was enacted vesting the Chancery Court at Nashville with jurisdiction of a suit to foreclose and enforce the state's lien, and to declare the amount of the company's indebted-

[1] St. Paul & Pacific R. R. Co. *v.* Parcher, 14 Minn. 297; Chicago, Milwaukee & St. Paul Ry. Co. *v.* Pfaender, 23 Minn. 217.

[2] Morgan *v.* Louisiana, 93 U. S. 217.

ness, and define the rights, duties, and liabilities of a purchaser of the state's interest in the road. This court decreed a sale of the property and franchises of the company, and that the sale should vest the purchaser with all the rights, privileges, and immunities appertaining to the franchises of the charter. The sale was made on the faith of the decree, and the Supreme Court of the state [1] held that the validity of the adjudication could not be questioned; that the exemption from taxation was a right for which a consideration had been given, and the exemption attached to the property; and moreover that even if a new grant of immunity to the purchaser be regarded as necessary, the act of the legislature and the decree would probably be equivalent to such a grant.[2]

Where, however, a railroad chartered by the State of Missouri having a like exemption was foreclosed and sold to satisfy a statutory mortgage to the state, and was purchased by the state, the exemption was of course merged, because the exemption from the right of the state to tax the property would mean nothing when the state itself became the owner of the property. Therefore when the state came to sell the road again, it could sell it with or without the right of redemption without injustice to any one. Before the resale, the new Constitution of the state had forbidden the grant of any exemption from taxation; and it was held that the legislature could not authorize a sale with the exemption.[3]

II. *Organization of Purchasers into a New Corporation.*

661. Whether individual purchasers can manage the property as individuals. — When a corporation is expressly authorized to mortgage its franchise and corporate property upon a foreclosure of such mortgage, the franchise and property of the first corporation would pass into the possession and management of the mortgagee or of the purchaser subject to the like legislative control as the first; but whether an individual acquiring such property through a foreclosure could hold and manage it as an individual, or whether it would be necessary to form a corporation with the powers and duties of the original corporation, would depend upon the terms of the statute authorizing such mortgage, or

[1] Knoxville & Ohio R. R. Co. *v.* Hicks, Sept. Term, 1877, 15 Am. Railw. R. 197; 1 Tenn. Leg. Reporter, 338.

[2] See, also, Nichols *v.* New Haven & Northampton Co. 42 Conn. 103; Atlantic & Gulf R. R. Co. *v.* Allen, 15 Fla. 637.

[3] Trask *v.* Maguire, 18 Wall. 391.

upon the general laws and policy of the state in relation to this matter.[1] Aside, however, from statutes authorizing or requiring the purchasers to organize themselves into a corporation for the purpose of enjoying the property, it would seem in general that public policy would require an organization into a corporation. The laws granting the privilege of operating railroads, and regulating the management of them, are framed solely with reference to corporate bodies. Moreover, it is the universal custom to manage all such enterprises through the instrumentality of a corporate organization; and such an organization is so advantageous to the owners that there is no wish or attempt to manage them in any other manner. Where there are no general statutes authorizing purchasers to form a corporation for the purpose of using the property, they always obtain a special act of incorporation. At the present time, however, there are statutes in many of the states framed for the special purpose of enabling purchasers of railroads at foreclosure and execution sales to become a corporation immediately upon obtaining possession of the property, without any uncertain interval before such organization can be obtained under special acts. A statement of the more important provisions of these statutes is given in the following sections of this chapter.

662. Alabama.[2] — Mortgagees or others who may be or become purchasers of any railroad in this state under any judicial or other sale may reorganize the property so purchased in the manner provided for the incorporation of railroad companies; and within sixty days after its organization, such body corporate must file a certificate thereof, by its proper officers, in the office of the secretary of state. Purchasers are defined to be the persons who part with the actual consideration, or for whose benefit the purchase is made. In each and every case in which any railroad may be sold, by the state or by any commission, officer, or agent of the state, or under any proceedings, judicial or otherwise, authorized by law, the purchasers at any such sale may constitute themselves into a body politic and corporate, and shall have and possess all the powers and franchises which belonged to the company or corporation originally owning the railroad so purchased, including the power to purchase and hold real estate, and the fran-

[1] See Richardson *v.* Sibley, 11 Allen (Mass.), 65, 68.

[2] Code of 1876, §§ 1844, 1845, 1846; and see § 2053.

chise to be and exist as a corporation under such name as the purchasers may select and adopt. The boards of directors of such new corporations have power to issue bonds, and to lease, sell, or mortgage all or any part of the franchises or property of such corporations, including the franchise to be or exist as a corporation, to any natural person, or to any other railroad corporation chartered by this state or any other state of this Union.

The word "purchasers," as herein above used in every instance where the same occurs, is declared to mean and comprehend, not merely the trustees making the purchase, but the persons for whom, in whose behalf, for whose benefit or advantage, or in trust for whom such railroad is so purchased, being the persons who part with the actual consideration of such purchase; and in every case a majority in interest of such purchasers may organize such corporation for the benefit of themselves and of all other persons having like interest in such purchase desiring to unite therein.

663. Arkansas.[1] — The purchasers of any railroad created by or existing under the laws of this state, whether such sale be under the decree or order of any court of competent jurisdiction, or under the provisions of any mortgage or deed of trust duly executed, shall, upon the confirmation of such sale or the execution of the deed or deeds purporting to convey the property as sold, become a new body politic or corporate in fact and in law, by the name of the aforesaid corporation, or such other name as they may thereafter adopt, and shall be deemed the stockholders of the capital stock of such body politic and corporate, and shall become entitled to and vested with all the corporate rights, liberties, privileges, immunities, powers, and franchises of and concerning the said railroad so sold, not in conflict with the provisions of the Constitution of this state, as fully as the same were held, exercised, and enjoyed by such corporation before such sale; and it shall and may be lawful for the said new body politic and corporate at any time within one year after such sale and conveyance, to organize themselves as a corporation, under such name as they may vote to adopt, by electing a board of directors of not less than five nor more than thirteen persons, and by the election and appointment of a president, and such other officers as may be authorized or required by law; and such board of directors are

[1] Acts of 1874, p. 57.

authorized to fix the capital stock of such new corporation at an amount not exceeding the estimated cost of such railroad and equipments when completed, together with such lands as said corporation may acquire, and to issue certificates of the capital stock of such corporation and to distribute the same; also, whenever deemed expedient, to issue bonds, and to secure the payment thereof by mortgage or deed of trust of the property, lands, income, and franchises of said company. It shall be the duty of such new corporation, within six months after its said organization, to make a certificate thereof under the common seal, attested by the signature of its president, specifying the date of such organization, and the name of its president and directors, and cause such certificate to be filed in the office of the secretary of state at Little Rock, and there to remain of record.

664. Florida.[1] — In case of a sale of any railroad or canal, or any part thereof, constructed or in course of construction by any railroad or canal company, by virtue of any trust deed, or any foreclosure of any mortgage thereon, the parties acquiring title, their associates, successors, or assigns shall have or acquire thereby, and shall exercise and enjoy thereafter, the same rights, privileges, grants, franchises, immunities, and advantages in or by said trust deed enumerated and conveyed which belonged to and were enjoyed by the company making such deed or mortgage or contracting such debt, so far as the same relate or appertain to that portion of said road or canal, or the line thereof mentioned or described and conveyed by said mortgage or trust deed and no farther, as fully and absolutely in all respects as the corporators, office holders, shareholders, and agents of such company might or could have done had not such sale or purchase taken place. Such purchasers, their associates, successors, or assigns, may proceed to organize anew by filing articles of association and electing directors, and may distribute and dispose of stock, and may conduct their business generally; and such purchasers and their associates shall thereupon be a corporation, with all the powers, privileges, and franchises conferred by, and be subject to, the provisions of this act.

665. Georgia.[2] — In case of the sale of any railroad situated

[1] Laws of 1874, pp. 46, 47.

[2] Laws 1876, pp. 118, 119.

wholly or partly within this state, by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceeding, or pursuant to any power contained in such mortgage or deed of trust, the purchasers thereof or their assigns may, together with their associates (if any), form a corporation for the purpose of owning, possessing, maintaining, and operating such railroad, or such portion thereof as may be situated within this state, by filing in the office of the secretary of state a certificate, specifying the name and style of such corporation, the number of directors of the same, the names of its first directors, and the period of their services not exceeding one year, the amount of the capital stock of such corporation, and the number of shares into which it is to be divided; and the persons signing such certificate and their successors shall be a body corporate and politic by the name specified in such certificate, with power to sue and be sued, contract and be contracted with, and to own, possess, maintain, and operate the railroad referred to in such certificate, and to transact all business connected with the same.

Such corporation shall possess all the powers, rights, immunities, privileges, and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale, under or by virtue of its charter and any amendments thereto.

666. Indiana.[1] — In case of the sale of any railroad and its property situated wholly in this state, or partly within this state and partly in an adjoining state, by virtue of any mortgage or mortgages, deed or deeds of trust, either by foreclosure or other judicial proceedings, or pursuant to any power contained in such mortgage or mortgages, deed or deeds of trust, or by the joint exercises of said powers and authorities, the purchaser or purchasers thereof, their survivor or survivors, or he or his, or they or their associates or assigns, may form a corporation by filing in the office of the secretary of state a certificate specifying the name and style of the corporation, the number of directors, the names of the first

[1] Davis's Stat. 1870, p. 395, ch. 264, §§ 2, 3, being Act March 3, 1865; same in 1 R. S. 1876, ch. 218, §§ 2, 3, p. 728. See Act March 5, 1861, 2 G. & H. Stat. p. 291; 2 R. S. 1876, p. 680.

directors, and the period of their service, not exceeding one year, the amount of original capital, and the number of shares into which said capital is to be divided; and the persons signing said certificate and their successors shall be a body corporate and politic, by the name in said certificate specified, with power to sue and be sued, contract and be contracted with, and to maintain and operate the railroad in said certificate named, and transact all business connected with the same; and a copy of such certificate, attested by the signature of the secretary of state or his deputy, shall, in all courts and places, be evidence of the due organization and existence of the said corporation, and of the matters in said certificate stated. Such corporation shall possess all the powers, rights, privileges, immunities, and franchises, in respect to said railroad, or the part thereof purchased as aforesaid, and of all the real and personal property appertaining to the same, which were possessed and enjoyed by the corporation that owned or held the said railroad previous to such sale by virtue of its charter and amendments thereto, and other laws of this state, or of any state in which any part of said railroad is situate, not inconsistent with the laws of this state, and shall have power, at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlements with any stockholder or stockholders, creditor or creditors of such former corporation, as may be deemed expedient, and, for such purpose, to use such portions of the bonds and stock of such corporation as may be deemed advisable, and in such manner as such corporation may deem proper.

The above provisions are declared to apply to and embrace any and all sales or purchases of railroads, their franchises, rights, and privileges, under judicial decrees or judgments of any of the courts of this state, or of the United States, at any time, whether said sale under such decrees or judgments may have occurred before or after the passage of said act.[1]

667. Kansas.[2] — In case of the sale of any railroad or any part thereof, constructed or in process of construction, made in pursuance of the judgment of any court of competent jurisdiction, foreclosing any mortgage or deed of trust, any railroad corpora-

[1] Act Dec. 20, 1865; 1 R. S. 1876, p. 732.

[2] Laws of 1876, ch. 110; Dassler's Stat. 1876, § 4626.

tion, the person or persons acquiring title under such sale, and their associates, successors, and assigns, have and acquire thereby, and may thereafter exercise and enjoy, all the rights, privileges, grants, franchises, immunities, and advantages in and by such mortgage or deed of trust conveyed, which belonged to and were enjoyed by the company making such mortgage or deed of trust, so far as the same relate and appertain to that portion of the railroad or line thereof mentioned and described in and conveyed by said mortgage or deed of trust, and no further, as fully and absolutely in all respects as the corporators, shareholders, officers, and agents of such company might have exercised and enjoyed had no such sale or purchase been made; and such purchaser or purchasers, their associates, successors, or assigns, may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter under such original company, or in the laws relating thereto, with such variations in manner and form of organization as their altered circumstances may seem to require. But no greater or enlarged powers shall be exercised by the new organization than are conferred by the charter of such original company. Such new company is required to file in the office of the secretary of state a certificate, setting forth the facts required by the general statutes for the organization of corporations. The new company is subject to all the same obligations to the state or the public as the original corporation was. Such reorganization in nowise affects any liability against the old corporation existing at the time of the organization of the new company.

668. Kentucky.[1] — Whenever a railroad is sold under and in pursuance of a decree or judgment of a court of equity, or other court having jurisdiction, the purchasers thereof, or their assigns, together with such persons as may be associated with them, shall be authorized to become a body politic and corporate for the purpose of operating and completing said railroad, and shall be entitled to exercise all the franchises, powers, rights, and privileges, and shall be subject to all limitations, restrictions, and liabilities contained in the charter granted by the general assembly of the

[1] Laws 1876, ch. 319.

commonwealth under which said railroad was constructed and operated as they existed at the time of such sale.

The mode by which said purchasers, or their assigns and associates, as above mentioned, shall become incorporated, shall be as prescribed in chapter fifty-six of the General Statutes. The articles of incorporation of any such company may provide for the issue, at one or several times, of any amount of negotiable bonds, with or without coupons, bearing a rate of interest, payable semi-annually, not exceeding eight per cent. per annum, and of paid-up capital stock; said bonds and stock not to exceed, in the aggregate, the original cost of the construction of the railroad and equipment purchased, and such sum as may be necessary in order to complete the same; and may provide for priorities in the payment of the interest or principal of said bonds, or of dividends on different classes of its stock, and may regulate what right the different classes of stockholders and bondholders may have to vote in corporate meetings and elections, and may exempt the latter from responsibility in consequence of the exercise of such right. The corporation thus created may secure the payment of any bonds issued by it, under the authority conferred by this act, by mortgage or deeds of trust, upon all or any part of its property, rights, and franchises acquired or to be acquired.

669. Maine.[1] — The foreclosure of a railroad mortgage enures to the benefit of all the holders of bonds, coupons, and other claims secured thereby; and they, their successors and assigns, are constituted a corporation, as of the date of the foreclosure, for all the purposes, with all the rights and powers, duties, and obligations of the original corporation by its charter; and the trustees shall convey to such new corporation by deeds all the right, title, and interest which they had by the mortgage and the foreclosure thereof, and thereupon they shall be discharged. If they neglect or refuse so to convey, the court, on application in equity, may compel them so to do.

The new corporation may call its first meeting in the manner provided for calling the first meeting of the original corporation, and use therefor the old name; but at that meeting may adopt a new one, by which it shall always after be known; and it may take and hold the possession, and have the use of the mortgaged

[1] Rev. Stat. 1871, ch 51, §§ 55, 56.

property though a bill in equity to redeem is pending, and may become a party defendant to such bill. The new corporation may vote to redeem a prior mortgage, and may make assessments on the stockholders therefor.

When the franchise of a railroad and its road,[1] wholly or partly constructed, are sold by a decree of the court, by a power of sale in a mortgage thereof, or on execution, the purchasers have all the rights, powers, and obligations of the corporation under its charter, and may form a new corporation in the manner hereinbefore provided. If the original corporation or those claiming under it have a right to redeem, they may do so in the manner provided for the redemption of mortgaged real estate; but shall pay, in addition to the amount of the sale and interest, the reasonable expenditures made by the new corporation in completing, repairing, and equipping said road, and in the purchase of necessary property therefor, after deducting the net earnings thereof.

The trustees of bondholders, or other parties under contract with them, operating a railroad, and all the corporations formed in the modes hereinbefore provided, shall have the same rights, powers, and obligations as the old corporation had by its charter and the general laws; and shall also be subject to be amended, altered, or repealed by the legislature and subject to all the general laws concerning railroads, notwithstanding anything to the contrary in the original charter.

The original corporation shall exist, after the foreclosure of the mortgage, for the sole purpose of closing up its unsettled business, and the right of action against it or its stockholders shall not thereby be impaired; but in suits founded on any of the bonds or coupons secured by the mortgage, the proportional actual value of the property taken under the mortgage shall be deducted.

671. **Michigan.**[2] — In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall be competent and lawful for the parties who may become the purchasers, and others whom they may associate with them-

[1] Rev. Stat. 1871, ch. 51, §§ 67, 68, 69. [2] Laws 1873, p. 498. See Laws 1878, ch. 53.

selves, to organize a corporation for the management of the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; and such corporation, when organized, shall have the same rights, powers, and privileges, as are or may be secured to the original company, whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by virtue of a declaration or certificate of the purchasers at the sale under said mortgage or trust deed, which shall set forth the description of the property sold, and the date of the deed under which it was sold, or of the decree of the proper court, if it shall have been sold by virtue of a decree of any court; and with such description of the parties to the deed or suit as may identify the one or the other, or both; the time of the sale and the name of the officer who sold the same; and also the purchasers, and the amount paid, and the stockholders to whom stock is to be issued, and the amount of the capital stock and the name of the new corporation, and such other statements as may be found requisite to make definite the corporation whose property may have been sold, and the property sold, as well as the extents and rights and property of the new company; which said certificate or declaration shall be signed by all of the said purchasers, and shall be addressed to the secretary of state; and being filed and recorded in his office, the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject; and a certified copy of said certificate or declaration shall be *primâ facie* evidence of the due organization of said company.

672. Minnesota.[1] — Upon the sale of the franchises and property of any railroad corporation organized in this state under any mortgage or deed of trust, the purchaser at such sale shall become invested with all the rights, benefits, privileges, property, immunities, franchises, and interests, so foreclosed and embraced, or included in the said mortgage or trust deed, and in said sale, which were held at the time of the execution of such mortgage or deed of trust, or afterwards acquired by the company making such mortgage or deed of trust, and whether the said mortgage or deed of trust and sale shall have included the corporate franchises of

[1] Laws 1876, ch. 30.

such company or not, the said persons, for whose benefit such purchase shall have been made as aforesaid, may organize as hereinafter provided, and from the time of such organization shall be to all intents and purposes a corporation, with all and singular the corporate powers, rights, franchises, privileges, and immunities which were held at the time of the execution of such mortgage or deed of trust, or afterwards acquired by the company making such mortgage or deed of trust, so far as applicable to the road and property so purchased; and in the management and operation of the road or lines, as well as in the use and enjoyment of the property, franchises, and interests thus acquired, and in the conduct of all business growing out of such purchase, shall be entitled to all and singular the same rights, powers, privileges, immunities, and advantages theretofore granted to or bestowed upon the corporation making such mortgage or deed of trust, which were applicable to the road, property, and franchises so purchased while held and controlled by the last mentioned corporation, and may have, use, and exercise the same in their corporate capacity, under and through the organization herein provided for, in like manner and in all respects as the corporation making such mortgage or deed of trust might or could have done, had no foreclosure or sale taken place. The person or persons so purchasing shall, by themselves or their authorized attorneys or proxies, meet within thirty days after the delivery of the conveyance under such sale, or certificate of sale delivered, at some place within this state, of which, and the time of such meeting, notice shall be published, by the persons named as purchasers in such deed or certificate of sale, by publication in some of the daily newspapers of St. Paul, for at least ten days prior to the time of such meeting, at which time and place the said persons so purchasing shall adopt a corporate name for the proposed new organization, and may proceed without further notice and elect a board of not exceeding nine directors, and such board may thereupon elect a president, secretary, treasurer, and such other officers as the corporation making such mortgage or trust deed may theretofore or prior to such foreclosure have been authorized to elect, and adopt a corporate seal. From the time of such election of officers and the adoption of a corporate seal, the organization shall be deemed complete, and the company thus organized shall become and be a body corporate under the name so adopted as

aforesaid by the purchasers at the mortgage sale, and clothed as such, with the rights, powers, privileges, franchises, immunities, and advantages herein above in such case provided. It shall be the duty of such new organization, within thirty days after such organization shall be perfected, to make and certify under its corporate seal, attested by its president and secretary, a statement showing the date of such organization, the corporate name by it adopted, the amount of its capital stock, issued and unissued, common and preferred, the name of its president, secretary, treasurer, and other general officers, the number and names of its directors so chosen at said meeting, and cause the same, together with the conveyance or certificate of sale made to the purchasers upon the foreclosure, to be recorded in the office of the secretary of state of this state; and such record, or a certified copy of such record of said proceedings, shall be legal evidence of the existence of such corporation or organization; provided, however, that such court shall provide in such foreclosure decree, or otherwise, that such purchaser or purchasers shall fully pay all sums due and owing by such defaulting and foreclosed railroad company to any servant or employee of such company; and shall provide that such purchaser and such new corporation so by them to be formed under the provisions of this act shall complete all legal and subsisting contracts for sale of the lands of such company, and upon due performance on the part of any purchaser of such lands shall convey the real estate so purchased in pursuance of the contract or contracts so subsisting.

673. Mississippi.[1] — When any railroad company chartered in this state, and whose road lies in whole or in part in this state, which has mortgaged its franchises, road-bed, superstructure, and other property, shall afterward be sold for foreclosure of such mortgage by order or decree of any court of this state or of the United States, having jurisdiction thereof, the purchasers at said sale shall have the same right to operate said railroad in this state as the incorporated company which had executed said mortgage, and said purchasers thereof shall be entitled to and be invested with all the rights, privileges, and immunities appertaining to the property or franchises, or both, so sold in as full and complete a manner as the company was or is by virtue of its charter

[1] Laws 1877, p. 78, ch. 46.

of incorporation and amendments thereto, or by virtue of any other law or laws of this state.

The purchasers of said railroad, its property, franchises, &c., aforesaid, may fix the amount of capital stock representing the property bought, divide the same into shares of one hundred dollars each, and the holders of such stock may meet together, adopt a name for the company, and organize by the election of a board of directors of such number as they may see fit, not less than three, one of whom shall reside in this state (each share of said stock being entitled to one vote) ; and said board of directors may elect a president and such other officers as they may deem expedient for the proper management of said property, fix their duties, terms of office and compensation, and adopt by-laws not inconsistent with the laws of this state.

A statement signed by the board of directors, showing the name of the corporation, amount of capital stock, the shares into which the same is divided, number and residence of the board of directors, where the road is situated, the name by which it was chartered and heretofore known, shall be filed with the secretary of state, who certifies the fact of such filing, and the company is thereupon a body corporate, with all the privileges and franchises of the former company. It is made a condition precedent to the right of the purchasers to avail themselves of the privileges of this act, that they shall secure any indebtedness of the former corporation to the state.

The provisions of the foregoing statute are extended,[1] and made applicable to purchasers of the franchise, road-bed, and other property of any railroad company chartered in this state, and whose road lies in whole or in part in the state, at any execution sale thereof under judgments recovered in this state.

674. New Jersey.[2] — Whenever any railroad in this state, of any corporation created by or under any law or laws of this state, shall be sold or conveyed under or by virtue of any decree or decrees of the Court of Chancery of this state, or of the Circuit Court of the United States in and for the District of

[1] Laws 1878, ch. 112.

[2] Laws 1875, ch. 429, § 1 ; 2 Rev. 1877, p. 944, § 165. For provisions for the formation of new corporations upon foreclosure sale of railroads belonging to companies existing under the laws of another state, but having part of their route in this state, see Laws 1876, ch. 88, §§ 4–10.

New Jersey, sitting in equity, and execution or executions issued thereon, to satisfy any mortgage debt or debts, or other incumbrances thereon, and the purchaser or purchasers thereof shall, in the manner provided by the statute in such cases made and provided, have formed a new body politic and corporate, and shall have made and filed with the secretary of state at Trenton a certificate of the organization of such corporation; and whenever the new corporation so formed shall have acquired title to the railroad property and franchises aforesaid, pursuant to any plan or agreement for the readjustment of the respective interests therein of the mortgage creditors, other creditors, and stockholders of the company theretofore owning such property and franchises, and for the representation of such interests of the creditors and stockholders in the bonds, debts, or stock of the new corporation so formed, then and in such case the said new corporation shall be authorized and have the power to issue its bonds and stock in conformity with the provisions of such plan or agreement; and the said new corporation may, at any time within six months after its organization, compromise, settle, or assume the payment of any debt, claim, or liability of the former company upon such terms as may be approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization as aforesaid; and for the purposes of such plans and of such settlements, the said new corporations may and shall be authorized to establish preferences in respect to the payment of dividends in favor of any portion of its said capital stock, and to divide such stock into classes; provided, nevertheless, that nothing herein contained shall be held to authorize the issue of capital stock by the said new company to an aggregate amount exceeding the maximum amount of such stock mentioned in the certificate of incorporation filed by such new corporation.

Whenever any railroad, canal, turnpike, bridge, or plank road of any corporation created by or under any law of this state shall be sold and conveyed, under and by virtue of any process or decree of any court of this state or of the United States, or of any power or authority duly granted or conferred in and by any mortgage or deed in the nature thereof, the person or persons for or on whose account such railroad, canal, turnpike, or plank road may be purchased shall be constituted a body politic and corpo-

rate,[1] and shall be vested with all the right, title, interest, property, possession, claim and demand, in law and equity, of, in, and to such railroad, canal, turnpike, bridge, or plank road, with its appurtenances, with all the rights, powers, immunities, privileges, and franchises of the said corporation which may have been granted to it or conferred thereupon by statute or statutes in force at the time of such sale and conveyance, and subject to all the restrictions imposed upon such corporation by any such act or acts, except so far as the same are modified by this act; but the provisions of this act shall, notwithstanding anything therein contained to the contrary, extend and apply to any case in which a railroad, canal, turnpike, bridge, or plank road, or any corporation created by or under any law of this state, has been sold and conveyed before the passage of this act in the manner hereinbefore described.

The person or persons for or on whose account any such railroad, canal, turnpike, bridge, or plank road may have been purchased, shall meet within thirty days after the conveyance made by virtue of said process or decree shall have been delivered,[2] at the county town of any one of the counties through which the said railroad, canal, turnpike, bridge, or plank road may run, public notice of the time and place of such meeting having been given at least once a week for two weeks, in at least one newspaper published in each of the counties in or through which the said railroad, canal, turnpike, bridge, or plank road may run, and organize said new corporation by electing a president and board of six directors, to continue in office until the first Monday of May succeeding such meeting, when, and annually thereafter, on the said day, a like election for a president and six directors shall be held, to serve for one year. At such meeting so held, the said person or persons shall adopt a corporate name and corporate seal, determine the amount of the capital stock thereof, and shall have power and authority to make and issue certificates therefor to the purchaser or purchasers aforesaid, to the amount of their respective interests therein, in shares of fifty dollars each. The said corporation may then, or at any time thereafter, create and issue

[1] Laws 1877, ch. 92; 2 Rev. 1877, p. 945, § 167. For statute authorizing purchasers of turnpike road or steamboat company's property on execution to organize new corporations, see Laws 1876, ch. 157, § 1; 2 Rev. 1877, p. 923, § 82.

[2] Laws 1875, ch. 235; 2 Rev. 1877, p. 945, §§ 168–171.

preferred stock, to such an amount and at such times as they may deem necessary, and from time to time issue bonds at a rate of interest not exceeding seven per centum, to any amount not exceeding their capital stock. It shall be the duty of such new corporation, within one month after its organization, to make a certificate thereof under its common seal, attested by the signature of its president, specifying the date of such organization, the name so adopted, the amount of capital stock, and the name of its president and directors, and transmit the said certificate to the secretary of state at Trenton, to be filed in his office, and there remain of record.

675. New York.[1] — In case the railroad and property connected therewith, and the rights, privileges, and franchises of any corporation, except a street railroad company, created under the general railroad law of this state, or existing under any special or general act or acts of the legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction made or given to execute the provisions, or enforce the lien of any deed or deeds of trust, or mortgage theretofore executed by any such company, the purchasers of such railroad property and franchises, and such persons as they may associate with themselves, their grantees, or assignees, or a majority of them, may become a body politic and corporate, and as such may take, hold, and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges, and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by and upon filing in the office of the secretary of state a certificate, duly executed under their hands and seals, and acknowledged by an officer authorized to take the acknowledgment of deeds, in which certificate the said persons shall describe by name, and reference to the act or acts of the legislature of this state under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof authorizing or directing the same, together with a brief description of the property sold, and shall also

[1] Laws 1876, ch. 446. For prior act, see Laws 1874, ch. 430; 2 R. S. 1875, p. 553, §§ 111, 112.

set forth the following particulars: 1. The name of the new corporation intended to be formed by the filing of such certificate. 2. The maximum amount of its capital stock, and the number of shares into which the same is to be divided, specifying how much of the same shall be common, and how much preferred stock, and the classes thereof, and the rights pertaining to each class. 3. The number of directors by whom the affairs of the said new corporation are to be managed, and the names and residences of the persons selected to act as directors for the first year after its organization. 4. Any plan or agreement which may have been entered into pursuant to the second section of this act.

And upon the due execution of such certificate, and the filing of the same in the office of the secretary of state, the persons executing such certificate, and who shall have acquired the title to the property and franchises sold as aforesaid, their associates, successors, and assigns, shall become and be a body politic and corporate by the name specified in such certificate, and shall become and be vested with, and entitled to exercise and enjoy, all the rights, privileges, and franchises, which at the time of such sale belonged to or were vested in the corporation which last owned the property so sold, or its receiver, and shall be subject to all the provisions, duties, and liabilities imposed by the act to authorize the formation of railroad corporations; and a copy of the said certificate, certified by the secretary of state or his deputy, shall be presumptive evidence of the due formation of the new corporation therein mentioned, provided always, that a majority of said persons shall be citizens and residents of this state. In the certificate so to be filed shall be inserted the whole of the plan or agreement in the next section referred to. And such plan, agreement, and articles may regulate voting by and on the part of the holders of the preferred and common stock of said company, and may also allow, provide for, and regulate voting at and in said meetings, and also for directors, by and on the part of the holders and owners of any or all of the bonds of the company foreclosed, or of the bonds issued or to be issued, and payable by the new company, pursuant to any such plan, agreement, or articles; such right of voting by bondholders to be in such manner, for such period or periods, and upon such conditions as said articles may authorize and declare; but such articles shall contain suitable provisions for voting by proxy. Said articles shall not be inconsist-

ent with the Constitution or laws of this state, and shall not be binding upon the company until changed as therein provided for, or until otherwise provided by law.

In case the persons organizing, or whose duty it may be to organize the new corporation, to be formed as provided in the first section of this act, shall have acquired title to the railroad property and franchises which may have been sold as in said section mentioned, pursuant to any plan or agreement for or in anticipation of the readjustment of the respective interests therein of the mortgage creditors and stockholders of the company owning, or which last owned, such property and franchises at the time of any such sale, and for the representation of such interests of creditors and stockholders in the bonds or stock of the new corporation, to be formed as provided for in said section, the said new corporation shall be authorized, and shall have the power to issue its bonds and stock in conformity with the provisions of such plan or agreement; and the said new corporation may, at any time within six months after its organization, compromise, settle, or assume the payment of any debt, claim, or liability of the former company, upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization aforesaid.

Neither the sale nor the formation of such corporation shall interfere with the authority or possession of any receiver of the property and franchises, but he shall remain liable to be removed or discharged at such time as the court may deem proper. No suit or proceeding shall be commenced against said receiver, unless founded on wilful misconduct or fraud in his trust, except such as shall be commenced before the expiration of sixty days from the time of the discharge of said receiver; but after the expiration of said sixty days, the corporation that shall own or operate said railroad shall be liable in any action that may be commenced against such company, founded on any act or omission of such receiver, and to the same extent as such receiver, but for this provision, would be or remain liable, or to the same extent that such corporation would be, had it done or omitted the acts complained of against such receiver.

676. Ohio.[1] — The purchaser or purchasers of the real and

[1] Laws 1869, p. 334, §§ 1, 2; Sayler's Stat. p. 2207. See, also, Supplement to R. S.

personal property, road-beds, rights of way, fixtures, and franchises of any railroad company in the State of Ohio that shall have been or shall hereafter be sold pursuant to judicial order, judgment, or decree, and which sale has been confirmed by the court making the order of sale, may sell the same, or any portion thereof; and the title thereto, with all the rights, liberties, faculties, and franchises, shall pass by such sale and vest in the purchaser or purchasers thereof as fully as the same had been possessed, exercised, and enjoyed by such railroad company, and which passed by said judicial sale; which grant, being in the same form as by law required to pass real estate, shall be recorded in the record of deeds of the county or counties in which said real or personal property is situated, and said rights and franchises are or may be exercised.

Any railroad company organized or existing under the laws of this state may become the purchasers of such property; and any number of persons, not less than five, may become the purchasers of such road, road-bed, rights of way, property, and franchises, and upon filing a copy of said grant in the office of the secretary of state shall become a corporation, with perpetual succession, by such name as they may assume for themselves, under the general laws of this state regulating corporations, and shall hold the property, rights, and franchises so purchased free and discharged from all liability from the debts of the original corporation.

677. Pennsylvania.[1] — Where a mortgage, executed by a railroad company incorporated under the laws of another state, grants and conveys a railroad, situated partly within this and partly within another or other states, and where the mortgage of the railroad within this state has been authorized or confirmed by the laws of this state, any corporation formed under the laws of the state within which the corporation which last owned the said railroad was incorporated, that shall, under the said laws, succeed to or become invested with the title acquired by purchasers or mortgagees of the said railroad, and the franchises appurtenant thereto, under any sale or foreclosure thereof under the said mort-

1868, pp. 125–131; Acts April 13, 1865; April 7, 1863; April 11, 1861. For statute authorizing purchasers to issue bonds for the purpose of completing or extending their road, or purchasing rolling stock, see Laws 1873, p. 291, § 5; Sayler's Stat. p. 3140.

[1] Laws 1876, p. 93, § 1, No. 57.

gage, adjudged, ordered, or decreed by a court of competent jurisdiction of the said last mentioned state, shall succeed to or become invested with the ownership of the said railroad within this state, and the franchises appurtenant thereto, and with all other the estate, real and personal, rights, privileges, and franchises in this state, the title to which of the said purchasers or mortgagees has become vested in the said corporation ; and said corporation shall hold and enjoy the same free and discharged from every incumbrance or charge thereon subsequent in lien to that of the mortgage or mortgages under which the said sale or foreclosure was had, except where otherwise provided in the said order or decree, as fully and completely as the same were possessed by the company as whose property they were sold, and with every power relating to the use, management, disposition, sale, or mortgage thereof, which was held and enjoyed by the said company, but subject, nevertheless, to all the provisions of the laws of this commonwealth under which the same were held or possessed by the last named company, and without any greater or other estate, right, title, or privilege therein ; provided, however, that the said order or decree of sale or foreclosure shall, as to the said railroad within this state, franchises appurtenant thereto, and other the estate, real and personal, rights, privileges, and franchises within this state, included within the said sale or foreclosure, have been adopted or enforced by an order or decree, confirmatory thereof or ancillary thereto, made by a state or federal court of competent jurisdiction within this state.

678. South Carolina.[1] — In case of the sale of any railroad, situated wholly within this state or partly within this state and partly in an adjoining state, by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceeding, or pursuant to any power contained in such mortgage or deed of trust, the purchaser or purchasers thereof, or his or their survivor or survivors, representatives or assigns, may, together with their associates, form a corporation for the purpose of owning, possessing, maintaining, and operating such railroad, or such portion thereof as may be situated within this state, by filing in the office of the secretary of state a certificate specifying the name and style

[1] Acts 1876, page 160. For provision allowing connecting road to purchase, see R. S. 1873, c. 65, § 14.

of such corporation, the number of directors of the same, the name of its first directors and the period of their services, not exceeding one year, the amount of the capital stock of such corporation, and the number of shares into which it is to be divided ; and the persons signing such certificate and their successors shall be a body corporate and politic, by the name specified in such certificate, with power to sue and be sued, contract and be contracted with, and to own, possess, maintain, and operate the railroad referred to in such certificate, and to transact all business connected with the same; and a copy of such certificate, attested by the secretary of state or his deputy, shall, in all courts and places, be evidences of the due organization and existence of such corporation and of the matters specified in such certificate.

Such corporation shall possess all the powers, rights, immunities, privileges, and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this state or the laws of any other state in which any part of such railroad may have been situated, not inconsistent with the laws of this state. Such corporation shall also have power to make and issue bonds, bearing such rate of interest, not exceeding seven per cent. per annum, payable at such times and places, and in such amount or amounts, as it may deem expedient, and to sell and dispose of such bonds at such prices and in such manner as it may deem proper, and to secure the payment of such bonds by its mortgage or deed of trust of its railroad or any part thereof, and its real and personal property and franchises.

679. Tennessee.[1] — The purchasers of any railroad chartered by this state, and lying in whole or in part in this state, which is sold under any mortgage heretofore or hereafter executed by it, who shall be, under said sale, put in possession of said railroad by any court of competent jurisdiction, shall have the same rights to operate the same in this state as the incorporated company which executed said mortgage had by the laws of this state.

The purchasers of such railroad, its property and franchises,

[1] Acts 1877, ch. 12, §§ 1, 3.

may, after being put in possession of said property under such sale, meet together, adopt a name for the company or corporation to operate said railroad, and elect a board of directors of such members as they may see fit, not less than three, at least one of whom shall reside in this state. The said board of directors shall make a certificate showing the name of the corporation, the amount of its capital stock, the shares into which the same is divided, the number and residence of the board of directors, where the road lies, and the name or names by which it has heretofore been chartered and known, and shall cause the same to be signed by the president and the members of such board, and to be filed with the secretary of state; and thereupon the said purchasers shall be a body corporate, under the name so adopted, with all the rights, powers, privileges, immunities, and franchises possessed under the laws of this state by the company or companies whose road and franchises were sold as aforesaid, under the acts of incorporation thereof, any amendments thereto, or any subsequent act or acts of this state, and with all the rights, powers, privileges, and franchises possessed by the corporation formed and organized for the building of railroads.

680. Texas.[1] — The road-bed, track, franchise, and chartered powers and privileges of a railroad company shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter, or by virtue of the general laws of this state; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter, and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof, in the same manner and to the same extent, as if they were the original corporators of said company; and shall have power to construct, complete, equip, and work the road, upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of this state.

[1] Paschal's Dig. 1866, p. 820, arts. 4912, 4916. See, as to construction of this statute, Witherspoon v. Texas Pacific R. R Co. 48 Tex. 309.

The directors or managers of the old company at the time of such sale are made trustees of the creditors and stockholders of that company, with power to settle its affairs, collect and pay its debts, to sue and be sued, and to divide the surplus among the stockholders.

681. Vermont.[1] — In all cases where a mortgage of any railroad or any part thereof made by any railroad company in this state, to secure the payment of bonds, shall have been foreclosed, and the legal title to the mortgaged premises vested in the mortgagees, any number of persons holding a majority in amount of the principal of the bonds so secured may form themselves into a corporation for the purpose of owning or maintaining and operating such railroad, or part thereof, for public use, in the conveyance of persons and property, in the manner following: they may make, subscribe, and file articles of association, in which shall be set forth a brief statement of the making and foreclosure of the mortgage under which they have become interested in such railroad; the amount of bonds which were owing upon and secured by the mortgage; the name of the corporation to be formed; the amount of its capital stock, which shall not exceed the amount of principal and interest of said bonds, and twenty-five per cent. on the same in addition thereto, and the number of shares, each of which shall be fifty dollars, into which the capital stock shall be divided; the number of directors by whom the corporation shall be managed; the names of the persons who shall be directors for the first year, and until others are chosen in their places, and a majority of the directors of such corporation shall be residents of this state. Each subscriber to such articles shall state in his subscription the number of shares which he takes or agrees to take, and the amount of bonds held by him and secured by such mortgage which he intends to surrender in payment or part payment of his subscription; such subscription may be made by the holder in person, or by his attorney or agent, and any three of the persons named in said articles as directors may be inspectors of such subscriptions, and the production of any such bond shall be evidence of the right of the person holding the same to subscribe to said articles.

Such articles of association shall be filed in the office of the

[1] Gen. Stat. 1870, ch. 28, §§ 104, 105, 110, 112.

secretary of state, and a copy thereof filed and recorded in the offices of the clerks of each of the counties through which the said railroad shall pass; and a notice of the formation of such corporation, and of the filing of the articles, shall be published once a week for three successive weeks in a newspaper published in each of said counties, if any be published therein, and for six successive days in two or more dailies published in each of the cities of New York and Boston; but such articles shall not be so filed until the amount of bonds, to be surrendered by the subscribers thereto for that purpose, shall be at least a majority in amount of the principal of the bonds secured by the mortgage referred to in such articles; nor until there is indorsed thereon, or annexed thereto, an affidavit made by at least three of the directors named in such articles, that they have in good faith examined the list of such subscribers, and that they believe the said subscribers to be the holders or representatives of the amount of bonds therein stated, and that they believe the said subscribers intend, in good faith, to comply with the terms of their subscription. If there should be any case of neglect or failure to organize a new corporation under the provisions of this statute, when a mortgage has been foreclosed, or if the railroad on which the mortgage exists shall be sold or assigned by virtue of any order, decree, or judgment of any court, then and in that event, when the purchaser, purchasers, grantee, or grantees shall acquire title to the same in the manner prescribed by law, such purchaser, purchasers, grantee, or grantees shall have, take, and possess all the rights, powers, and privileges in this statute hereinbefore granted to a majority of the bondholders, and be subject to like duties; and may associate with him or them any number of persons, and make, sign, and file articles of association as before prescribed by this chapter, and shall thereupon be a corporation with all the powers, privileges, and franchises, and be subject to all the duties granted to or imposed upon railroad corporations.

Whenever a sale shall be made of any railroad and franchises, either with or without other property, under or by virtue of any railroad mortgage or power of sale thereof, for the security of any debt of any railroad company, or when any such sale shall be made under the order of any court, any creditor or any number of creditors of such road, under such mortgage, may, within three months next after such sale, pay into the Court of Chancery

making such order of sale, or if no order of sale has been made, into the Court of Chancery in some county through which such road is located, for the use of the purchaser at such sale, a sum bearing the same proportion to the price paid by such purchaser with twelve per cent. interest thereon from the time of such sale, that the debt so held by such creditor under such mortgage bears to the whole amount of debt outstanding under such mortgage; whereupon such creditor so paying shall have a legal and equitable interest in all the property so sold in common with such purchaser in the proportions aforesaid; and in all such cases the Court of Chancery shall have power in a summary manner to adjust the rights of the parties, and to grant such specific relief as the nature of the case may require.

When a railroad and the property connected therewith is sold under a mortgage by virtue of a power of sale or under decree of court, and the same is subject to a prior mortgage, the sale is made subject to such prior incumbrance. The purchasers may organize in the manner above provided; and the new corporation may issue preferred stock to discharge such incumbrance. The capital stock of such new corporation is required to be divided into shares of not less than fifty dollars each.[1]

682. Virginia.[2] — If a sale be made under a deed of trust or mortgage executed by a company on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation, by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the court in which the conveyance shall be recorded.

The corporation created by or in consequence of such sale and conveyance shall succeed to all franchises,[3] rights, and privileges,

[1] Act 1866, No. 13.

[2] Code 1873, ch. 61, § 44.

[3] Code 1873, ch. 61, § 45.

and perform all such duties, as would have been had or should have been performed by the first company, but for such sale and conveyance; save only that the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of or claims against the said first company, which may not be expressly assumed in the contract of purchase, and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper.

683. West Virginia.[1] — If a sale be made under a deed of trust or mortgage, executed by a railroad or other internal improvement company in this state, on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them, and recorded in the recorder's office of any county wherein the property so sold, or any part thereof, is situated, or where said conveyance is recorded. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform

[1] Acts 1871, ch. 70, §§ 1, 2. Act of Dec. 30, 1875, with similar provisions, was repealed, and the above Act of 1871 expressly continued in force by Act 1877, ch. 23.

all such duties as would have been had or should have been performed by the first company, but for such sale and conveyance; save only that the corporation so created shall not be entitled to debts due to the first company, and shall not be liable for any debts of, or claims against, the said first company, which may not be expressly assumed in the contract of purchase; and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding, together the amount of stock in the first company at the time of the sale, and assign the same in a book kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for four successive weeks in a newspaper printed in each county in the state wherein said corporation may do business.

684. Wisconsin.[1] — In case of sale of any railroad or railroads, or any part thereof, constructed or in process of construction by any railroad company, on or by virtue of any trust deed or on any foreclosure of any mortgage thereupon, the party or parties acquiring title under such sale, and their associates, successors, and assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities, and advantages in and by said mortgage or trust deed enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debt, so far as the same relate and appertain to that portion of said road, or the line thereof mentioned and described in and conveyed by said mortgage or trust deed, and no further, as fully and absolutely in all respects as the corporators, shareholders, officers, and agents of such company might or could have done therefor, had not such sale or purchase taken place; such purchasers, their associates, successors, or assigns, may proceed to organize anew by filing articles of association and electing directors as provided in this act; and may distribute and

[1] Laws 1877, ch. 144, § 1.

dispose of stock, take the same or another name, and may conduct their business generally in the manner provided in this act; and such purchaser or purchasers and their associates shall thereupon be a corporation, with all the powers, privileges, and franchises conferred by, and be subject to the provisions of this act; provided, that if the parties purchasing at such foreclosure sale, and so organized anew, own or represent a majority of the bonds secured by said mortgage or trust deed, and also include the persons who at the rendition of such judgment or foreclosure decree owned a majority of the capital stock of said company, the sale under such judgment or decree shall not be deemed or held to be such a sale within the meaning of any law of this state, particularly applicable to said company, as to deprive the parties so purchasing and organizing anew, or the company so organized, of any special exemption, privilege, or immunity granted by any law of this state to the company which executed such mortgage or trust deed, and operating upon any of the property in such instrument described, embraced, or referred to; but such parties so purchasing, as in this proviso first mentioned, and the company organized by such purchasers, shall have, possess, and enjoy any such special exemption, privilege, or immunity as fully as the company executing such mortgage or trust deed might or could have done if such foreclosure or sale had not taken place.

CHAPTER XXIV.

PROCEEDINGS IN BANKRUPTCY AND INSOLVENCY AGAINST RAILROAD COMPANIES.

685. Railroad companies are within the operation of the late Bankrupt Act of the United States, which in terms was made to apply "to all moneyed, business, or commercial corporations and joint stock companies."[1] It provided that like proceedings may be had and taken as are provided in the case of other debtors, either "upon the petition of any officer of such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company." But no discharge could be granted to such corporation or company, or to any officer or member of it.[2] The constitutionality of this act, as applied to persons other than merchants and traders, has been called in question, on the ground that at the time of the adoption of the Constitution the English system of bankrupt laws was limited to such persons, and therefore it was argued that the grant to Congress of the power to establish uniform bankrupt laws must be construed as limited to the making of a bankrupt law which should apply only to the same persons. But this limitation in the English system is a mere matter of policy, and by no means enters into the nature of such laws.[3] This question of constitutionality is, however, no longer open to discussion.[4]

686. The Bankrupt Act not inapplicable to corporations on

[1] Winter *v.* Iowa, Minn. & N. Pacific Ry. Co. 2 Dill. 487; *S. C.* 7 N. B. Reg. 291; *In re* California Pacific R. R. Co. 3 Sawyer, 240; Sweatt *v.* Boston, Hartford & Erie R. R. Co. 3 Cliff. 339; 5 N. B. Reg. 234; Alabama & Chattanooga R. R. Co. *v.* Jones, 5 N. B. Reg. 97; Adams *v.* Boston, Hartford & Erie R. R. Co. 4 N. B. Reg. 314.

[2] Bankrupt Law, § 5122, Rev. Stat. of U. S.; Bump's Law of Bankruptcy, 10th ed. 791.

[3] Story's Com. on Const. § 1113.

[4] *In re* California Pacific R. R. Co. 3 Sawyer, 240.

the ground that it provides no discharge for them. — It has also been objected that the Bankrupt Act is unconstitutional so far as it applies to corporations, because it denies to them the right in any case to obtain a discharge. But it has never been decided that "a law on the subject of bankruptcy, within the meaning of the Constitution, must provide for the discharge of all persons subject to its provisions." Mr. Justice Hoffman, of the District Court of the United States for California,[1] in overruling this objection, said: "The books contain about forty reports of such cases in the District and Circuit Courts, and in the Supreme Court of the United States. In no one has the objection I have been considering been noticed. I do not claim that this general acquiescence in the validity of the law has the authority of an express judgment on the point; but surely such a tacit admission and consent, *semper ubique et ab omnibus*, are entitled to great weight in determining a doubtful question of constitutional construction, even conceding this question to be such."

Railroad and other private corporations are also, like natural persons, severally subject to compulsory proceedings in insolvency under the state insolvent laws,[2] or may voluntarily take advantage of such laws.[3]

687. Authority to present a petition in behalf of the corporation. — In bankruptcy proceedings against the Alabama and Florida Railroad Company it was objected that no officer of the company had been duly authorized by a vote of the majority of the corporators present at a legal meeting called for the purpose to present any petition for adjudication of bankruptcy. The Circuit Court of the United States held, however, that the proceedings were regularly instituted, since, if any irregularity occurred in the call for the stockholders' meeting, by which the direction was given to institute the proceedings, it arose from the contumacy of certain directors, who resigned their offices for the purpose of embarrassing the stockholders. The city of Pensacola owned more

[1] *In re* California Pacific R. R. Co. 3 Sawyer, 240.

[2] Platt *v.* N. Y. & Boston R. R. Co. 26 Conn. 544.

[3] The Insolvent Act of Massachusetts, from which the National Bankrupt Act was for the most part taken, applies to all corporations of the state except railroad and banking companies. G. S. 1860, ch. 118, § 113. A street railway company cannot be subjected to proceedings under this act. Central Nat. Bank of Worcester *v.* Worcester Horse R. R. Co. 13 Allen (Mass.), 105.

than five sevenths of the stock of the company, and it was sufficiently clear that the city authorities took all practicable measures for having a fair stockholders' meeting and vote on the subject; and that the vote of the city was positive in favor of the bankruptcy proceedings, and of the instruction to the president of the railroad company to institute them.[1]

The provisions in regard to authorizing proceedings in bankruptcy apply only to voluntary proceedings. No vote of the corporators is necessary to authorize counsel to appear for a corporation and consent to an adjudication of bankruptcy, or to admit acts of bankruptcy when involuntary proceedings against it have been commenced by a creditor. In such case the usual course is adopted, and the case proceeds as in ordinary cases when legal measures are instituted against corporations. They have the power to appear by counsel, and counsel have the power to admit facts and to bind corporations in the same manner as they do in other suits.[2]

Upon the filing of a petition in bankruptcy against a railroad company by creditors the court has authority to inquire into the value of securities held by the petitioning creditors and others, in order to ascertain whether the petitioners hold provable claims to the amount required by the Bankrupt Act.[3]

Service of the petition in bankruptcy upon a corporation is made personally by delivering a copy of the petition and order to show cause to its head or principal officers, or by leaving the order at the principal place of business of the corporation, which, within the meaning of the law, is its "usual place of abode."[4]

688. After bankruptcy proceedings have been commenced against a railroad corporation in one of two states in which it has a place of business, and under the laws of which it is chartered, these proceedings should be allowed to proceed to their final conclusion without the interference of the District Court of the other state. The Boston, Hartford and Erie Railroad Company was chartered by the State of Connecticut, and afterwards

[1] Davis *v.* Railroad Co. 1 Woods, 661, per Bradley, Circuit Justice.

[2] Lister *v.* Republic F. Ins. Co. 7 Biss. 26.

[3] *In re* California Pacific R. R. Co. 3 Sawyer, 240; *In re* Osage Valley & So. Kansas R. R. Co. 9 N. B. R. 281.

[4] *In re* California Pacific R. R. Co. 3 Sawyer, 240.

received a grant of corporate privileges from the State of Massachusetts. The company was adjudged bankrupt in the latter state, and subsequently proceedings in bankruptcy were commenced in Connecticut. The creditor on whose petition the adjudication had been made in Massachusetts petitioned the District Court in Connecticut, alleging that the proceedings in Connecticut were collusive, and would prejudice the creditors of the company, and embarrass the settlement of the estate, and praying to be allowed to appear and defend against the petition, and for further relief.

This petition was dismissed by the District Court in Connecticut, which proceeded to adjudicate the corporation bankrupt. Upon a petition of review the Circuit Court of the United States held that this petition should have been entertained; that the facts set forth warranted the creditor's intervention, and that the District Court for Massachusetts should be permitted to exercise the jurisdiction it had acquired, and that the proceedings in the District Court for Connecticut should be stayed. Judge Woodruff, delivering the opinion of the court, said:[1] "I am of opinion that, in the absence of any express provision, it would be the duty of the other District Courts to yield the control and direction of the entire proceeding to that one whose jurisdiction was first invoked, and whose power is ample to accomplish all the purposes of the law, and protect the rights of all parties interested, under the authority of the same act which governs each of them. Without this, it is difficult to see how the law can be safely, uniformly, and legally administered. On the appointment of an assignee, all the property of the bankrupt is, by express terms, vested in him by the assignment made, and such assignment relates back to the commencement of the proceedings. When, therefore, one court, having jurisdiction, has adjudged a debtor a bankrupt, appointed an assignee, and executed the assignment, nothing of the property of the bankrupt remains to him to be taken or administered by another tribunal. All is vested in the assignee appointed by the other, as of the time when the first petition was filed."

Whether the bankrupt company was to be regarded as a single corporation, or as two corporations united in interest, having one and the same corporators, the same creditors, and the same prop-

[1] *In re* Boston, Hartford & Erie R. R. Co. 9 Blatchf. 101.

erty, the District Court for Massachusetts, having first acquired jurisdiction of the case, should be permitted to retain jurisdiction until the proceedings should be closed. The proceedings in the District Court for Connecticut need not be necessarily dismissed; but if not dismissed must be stayed.

Whether the insolvency courts of a state have jurisdiction of a consolidated corporation formed in part of railroad companies originally organized under the laws of other states, the consolidation having been effected by concurrent legislation of the several states in which the entire line of road was located, is a different and more difficult question.[1] It would seem that such courts would have no jurisdiction of the companies organized in other states, and holding property in them by virtue of such organization, except so far as these courts could reach the property and franchises in other states through the jurisdiction and control of the courts over the officers of the consolidated company.

689. **A railroad company is not a "banker, broker, merchant, trader, manufacturer, or miner,"** within the terms of the Bankrupt Act, providing that the fraudulent stopping of payment by any person included in any one of these classes, or the stopping or suspension and non-resumption of payment by any person included in any of these classes of his commercial paper for fourteen days, though not fraudulent, shall be acts of bankruptcy.[2]

690. **Whether precedence will be given to foreclosure suits or to proceedings in bankruptcy** depends upon the discretion of the court in view of the circumstances of the case. The Lake Superior Ship Canal, Railroad, and Iron Company having executed four successive mortgages of its canal and property, the trustee under the first mortgage filed a bill in equity in the Circuit Court of the United States for the Eastern District of Michigan to foreclose the mortgage, and to this bill the company and the subsequent mortgagees were made parties. A receiver was appointed in this suit, and authority given him to create an indebtedness which should be a first lien upon the property. The second and third mortgagees soon afterwards filed bills in the same court to

[1] See Platt *v.* N. Y. & Boston R. R. Co. 26 Conn. 544.

[2] Winter *v.* Iowa, Minn. & North Pacific Ry. Co. 2 Dill. 487.

foreclose these mortgages, without first obtaining leave of court. The mortgagor was then adjudged bankrupt and assignees appointed, who by supplemental bills were made parties to the several foreclosure suits. Subsequently the trustee under the fourth mortgage filed a bill to foreclose that mortgage in the Bankruptcy Court. The assignees objected to the maintenance of the suits by the subsequent mortgagees, because they were already impleaded in the suit on the first mortgage, and their rights could be adjusted in that suit; and moreover the amount of the prior lien being in doubt and having been put in issue by the pleadings, it would be impossible to make a proper decree under either of the subsequent bills. The assignees therefore filed an original bill in the Circuit Court, which had for its object a sale of the mortgaged premises free of liens and the ascertainment of the rights of the various parties interested in the proceeds, and their distribution accordingly. The proceedings in the foreclosure cases were stayed. The question then arose whether the foreclosure suits should be permanently stayed, or whether the equities of the parties should be worked out in those suits, or some one of them.[1]

In regard to the subsequent foreclosure suits the court was of opinion that they should not be prosecuted without leave of court, and that such leave should not be granted, inasmuch as the relief sought could be had in the pending legislation. A strong preference was expressed for continuing the working of the causes in the hands of the mortgagees, whose interests were greater than those of the assignees; and for making the suit on the first mortgage the means of working out the rights and remedies of all parties.

The court, however, declared its power to order all matters pending in the several foreclosure suits in that court to be adjudicated in an original suit, commenced in that court by the assignees in bankruptcy; that it was a question of practice and convenience whether the court would take the one course or the other. The court might also entertain a bill by the assignees in bankruptcy against the several lien-holders to ascertain the amounts due, and to sell the property free of incumbrances. The power exercised in the Court of Bankruptcy, to sell mortgaged

[1] Sutherland *v.* Lake Superior Ship Canal, R. R. & Iron Co. 1 Cent. Law Jour. 127; *S. C.* 9 N. B. Reg. 298, 307.

property free from all incumbrances, is but an instance of the exercise of a power familiar to a Court of Chancery.[1]

691. **The Bankruptcy Court has no authority to take property out of the possession of a receiver** appointed under order of a state court in chancery, in proceedings for foreclosure previous to the commencement of proceedings in bankruptcy. The possession of the receiver in such case is the possession of the mortgagees, and cannot be interfered with without liquidating the debt. The trustees of the first mortgage of the Alabama and Florida Railroad Company, on the first day of June, 1867, filed a bill to foreclose it in a county court of the State of Florida, and on the eleventh day of the following month a receiver was appointed, who took possession of the railroad and mortgaged property. Two days after the appointment of the receiver the company, by its officers, filed a petition in bankruptcy, and was adjudged bankrupt by the District Court of the United States for the Northern District of Florida, and subsequently an assignee was appointed. On his application the District Court ordered the mortgaged property to be taken out of the hands of the receiver and delivered to the assignee, by the United States marshal. Afterwards, in February, 1868, the same court ordered the property to be sold as perishable property. The sale took place on the twenty-fifth day of March following, the trustees of the mortgage giving public notice that they claimed the proceedings to be illegal. The purchasers of the road organized a new corporation under the name of the Pensacola and Louisville Railroad Company. The trustees and receiver then filed a petition in the Circuit Court of the United States for a revision of the proceedings of the District Court. The circuit justice, Mr. Bradley, made a decree declaring the taking of possession of the property by the assignee to be illegal, and setting aside the order of the District Court requiring the receiver to surrender the property. The question whether the sale in bankruptcy should be set aside was reserved, and after argument was now decided; the sale being set aside and the purchase money paid to the assignee ordered to be returned.[2] Mr. Justice Bradley, delivering the opinion of the

[1] See, also, Ellis *v.* Boston, Hartford & Erie R. R. Co. 107 Mass. 1, 32.

[2] Davis *v.* Railroad Co. 1 Woods, 661. See, also, Sutherland *v.* Lake Superior Ship Canal, R. R. & Iron Co. 1 Cent. Law Jour. 127; 9 N. B. Reg. 298, 307; Myer

court, said: "The respondents' assignee contended that the sale should stand although the order of sale was illegal. I do not think so in such a case as this. It is analogous to that of a sale by a sheriff on execution against A. of property belonging to B. The sale is void. The owner may recover his property of the purchaser. So may the trustees in this case. They ought not to be compelled to take the proceeds arising from the unlawful sale. Their rights might, in this way, be wholly sacrificed. . . . . The question then arises as to the disposition to be made of the purchase money paid or secured to be paid by the respondents. The purchasers insist that it should be returned; the assignee, that it should be retained by him for the benefit of the general creditors. From an examination of the evidence it seems clear that the assignee assumed to sell the property clear of the mortgage. He did not profess to sell the mere equity of redemption. The respondents in their answer claim that the sale was made free from the lien of the mortgage. They claim that the mortgage was void. And whilst it is true that the petitioners gave notice at the time of the sale that it would be subject to their lien, the assignee and the purchasers did not act on this view. The latter never intended to purchase subject to the lien, but clear of the lien. Had the receiver sold the property subject to the first mortgage, the amount bid for it by the respondents would have been payable by them, and would have been a proper asset of the bankrupt company's estate. But as they did not sell it in that manner, but sold it as unincumbered property, so far as the first mortgage was concerned, and as that was a clear mistake, since the first mortgage was a valid lien and absorbed the entire property, the sale ought to be held invalid, and the proceeds of the sale ought to be returned to the purchasers. This is clearly the justice of the case, and in my judgment the law is not contrary thereto."

692. For what amount a holder of bonds as collateral may prove. — When a company has pledged its own mortgage bonds for a debt of a less amount, upon a winding up of the company, the holder is entitled to receive dividends on the whole amount

v. Crystal Lake Pickling & Preserving Works, 14 N. B. Reg. 9; Freeman *v.* Fort, Ib. 46; High on Receivers, §§ 52 & 53. But see, *contra*, *In re* Merchants' Ins. Co. 3 Biss. 162.

expressed to be secured by the debentures *pari passu* with the holders of the other debentures; but of course is not to receive more in the whole than what is due upon the original debt with interest.[1] The debenture holder could not otherwise reach his share of the property mortgaged, as to which he had priority over other creditors.[2]

A creditor holding the guaranty of a third person may prove his claim in full against the principal debtor without surrendering the guaranty.[3] The dividend received in respect to the amount guaranteed goes to reduce the claim against the guarantor.[4]

693. **Fraudulent mortgagees allowed to prove their actual advances as an unsecured debt.** — A mortgage given by a railroad company to an association organized as a corporation whose declared object was "the completion and ownership" of such railroad, and of which association the president and vice president of the railroad company were secret members, was held to be constructively fraudulent by reason of the trust relations between the parties to it, and in view of the effect on the company and its creditors of giving judicial sanction to the transaction; but upon the bankruptcy of the railroad company the association was allowed to prove the amount actually advanced by the association in money to the company as an unsecured debt.[5]

694. **Bankruptcy proceedings against a railroad company should be dismissed** when its stockholders have in good faith purchased nearly all the floating debt of the company, and are willing to give proper security for the payment of the balance of such indebtedness. It being evidently for the best interest of all parties, and the desire of a large majority, that the corporation shall be managed by its own officers, the court will not retain the custody and control of its property, in order to assist a few objecting creditors to coerce their claims. For such purposes the Bankruptcy Court has full equitable jurisdiction.[6]

[1] Regent's Canal Iron Works Co. *in re*, L. R. 3 Ch. D. 43; Jerome *v.* McCarter, 94 U. S. 734, 740.

[2] Per Colt, J., in Third Nat. Bank *v.* Eastern R. R. Co. 122 Mass. 240.

[3] *In re* Anderson, 7 Biss. 233.

[4] Raikes *v.* Todd, 8 Ad. & El. 846.

[5] Kappner *v.* St. Louis & St. Joseph R. R. Ass'n, 3 Dill. 228.

[6] *In re* Indianapolis, Cincinnati & La Fayette R. R. Co. 5 Biss. 287.

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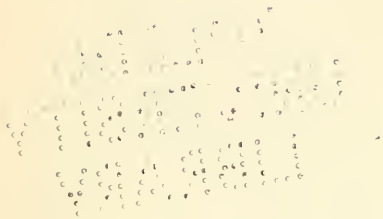

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